UNITED STATES DEPARTMENT OF AGRICULTURE

AGRICULTURE DECISIONS

DECISIONS OF THE SECRETARY OF AGRICULTURE

ISSUED UNDER THE

REGULATORY LAWS ADMINISTERED BY THE

UNITED STATES DEPARTMENT OF AGRICULTURE

(Including Court Decisions)

VOLUME 46 NUMBER 9

PAGES 1315 - 1624

SEPTEMBER 1987

Compiled And Published By:

Editor, Agriculture Decisions

Hearing Clerk Unit

Office of Administrative Law Judges

U.S. Department of Agriculture

Room 1079 South Building

Washington, D.C. 20250

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PREFATORY NOTE

Agriculture Decisions is an official publication designed to facilitate access to decisions and orders issued by the Secretary of agriculture, or officers authorized to act in his stead, in matters arising under laws administered by the Department of Agriculture.

The published decisions principally consist of those issued in formal adjudicatory administrative proceedings conducted for the Department under various statutes and regulations pursuant to the Administrative Procedure Act. Selected court decisions concerning the Department's regulatory programs are also included. The Department is required to publish its rules and regulations in the Federal Register and, therefore, they are not included in Agriculture Decisions.

Consent Decisions entered subsequent to December 31, 1986 are no longer published. However, a list of these decisions is included. (53 F.R. 6999, March 4, 1988.) The decisions are on file and may be inspected upon request made to the Hearing Clerk, Office of Administrative Law Judges.

Decisions are published in order of their issuance or finality under the principal statutes administered by the Department, which are the Agricultural Marketing Act of 1946 (7 U.S.C. § 1621 *et seq.*.), the Agricultural Marketing Agreement Act of 1937 (U.S.C. § 601 *et seq.*), Animal Quarantine and Related Laws (21 U.S.C. § 111 *et seq.*), the Animal Welfare Act (7 U.S.C. § 2131 *et seq.*), the Federal Meat Inspection Act (21 U.S.C. § 601 *et seq.*), the Grain Standards Act (7 U.S.C. § 1821 *et seq.*), the Horse Protection Act (15 U.S.C. § 1821 *et seq.*), the Packers and Stockyards Act, 1921, (7 U.S.C. § 181 *et seq.*), the Perishable Agricultural Commodities Act, 1930, (7 U.S.C. § 499a *et seq.*), the Plant Quarantine Act (7 U.S.C. § 151 *et seq.*), the Poultry Products Inspection Act (21 U.S.C. § 451 *et seq.*), and the Virus-Serum-Toxin Act of 1913 (21 U.S.C. § 151 *et seq.*).

The published decisions may be cited by giving the volume number, page number and year, e.g., 1 Agric. Dec. 472 (1942). It is unnecessary to cite a decision's docket or decision number. Prior to 1942 decisions were identified by docket and decision numbers, e.g., D-578; S. 1150 and the use of such references generally indicates that the decision has not been published in Agriculture Decisions.

LIST OF DECISIONS REPORTED

SEPTEMBER 1987

…ry Decisions (Cont.)

…ABLE AGRICULTURAL COMMODITIES ACT

…ary Decisions:

…on Decisions:

PAGE

PERISHABLE AGRICULTURAL COMMODITIES ACT (Cont.)

Reparation Decisions (Cont.):

PERISHABLE AGRICULTURAL COMMODITIES ACT (Cont.)

Reparation Decisions (Cont.):

PAGE

PERISHABLE AGRICULTURAL COMMODITIES ACT (Cont.)

Reparation Decisions (Cont.):

PERISHABLE AGRICULTURAL COMMODITIES ACT (Cont.)

Reparation Decisions (Cont.):

PERISHABLE AGRICULTURAL COMMODITIES ACT (Cont.)

Reparation Decisions (Cont.):

PERISHABLE AGRICULTURAL COMMODITIES ACT (Cont.)

Reparation Decisions (Cont.):

PERISHABLE AGRICULTURAL COMMODITIES ACT (Cont.)

Reparation Decisions (Cont.):

PERISHABLE AGRICULTURAL COMMODITIES ACT (Cont.)

Reparation Default Orders Cont.:

PERISHABLE AGRICULTURAL COMMODITIES ACT (Cont.)

Reparation Default Orders Cont.:

PERISHABLE AGRICULTURAL COMMODITIES ACT (Cont.)

Reparation Default Orders Cont.:

PAGE

PERISHABLE AGRICULTURAL COMMODITIES ACT (Cont.)

Reparation Default Orders Cont.:

PAGE

In re: BORDEN, INC., SOUTHLAND CORPORATION, and CARNATION COMPANY.
AMA Docket No. 126-9.
Decision and order filed September 30, 1987.

Location adjustments - Purposes of Act.

The Judicial Officer reversed Chief Judge Palmer's decision, which (i) held that the 18¢ per cwt increase in the location adjustment for Zone 8 plants under the Texas Milk Order is unlawful, and (ii) required the Market Administrator to restore petitioners to the circumstances which would have applied without the increase in the location adjustment (amounting to over $1 million per year). Petitioners have the burden of proof in as § 8c(15) (A) proceeding, which is not to "second guess" the Secretary's policy judgments. Different types of location adjustments explained. The Secretary's principal intent increasing the location adjustment applicable to Zone 8 handlers was to make the order's pricing structure more equitable by requiring handlers in Zone 8 to compensate producers for providing the economic service of transporting milk to Zone 8, an extremely deficit area. Petitioners do not challenge the Secretary's findings that the increased location adjustment does not exceed the additional transportation costs involved in transporting milk a substantial distance to Zone 8, Zone 8 has the largest population center in Texas, it is rapidly growing, and it is an extremely deficit milk production area. The Act authorizes such a location adjustment, and the Act's legislative history is supportive of the Secretary's action. The plain language of the stature is controlling even though the precise factual situation involved here may not have been contemplated by Congress when it enacted the Act. Location adjustments recognize the location value of milk. The Secretary's determinations to apply the 3¢ per cwt per 10 miles hauling rate only to Zone 8 and 9, and to refine the alignment of prices by considering alternative outlets for milk and changes in the location of milk production, were not arbitrary or capricious. In considering the level of the location adjustment for Zone 8, the Secretary properly considered broad purposes of the act other than the purpose to compensate producers for providing the economic service of transporting milk to that deficit area, *viz.*, to establish equity among producers, to establish equity among handlers, to eliminate disorderly marketing conditions, and to establish order prices that will assure an adequate supply of milk for that deficit area without over-order premiums. The Act is designed to benefit producers (and consumers), rather than handlers, and it is particularly designed to benefit cooperative associations. The Secretary's findings as to the location adjustment are not inconsistent with those made the prior year in his partial final decision, or with his 1975 merger decision. The Act states that the Secretary "shall" fix such prices as will insure a sufficient quantity of pure and wholesome milk. The word "shall" is the language of command. The word "insure" means to make certain. Prior cases relating to location adjustments analyzed. The notice of proposed rule making adequately advised petitioners as to the proposed changes in location adjustments.

Garrett Stevens, for Complainant.
David C. Toomey, for Petitioners.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

TABLE OF CONTENTS

PERISHABLE AGRICULTURAL COMMODITIES ACT (Cont.)

Reparation Default Orders Cont.:

PAGE

PERISHABLE AGRICULTURAL COMMODITIES ACT (Cont.)

Reparation Default Orders Cont.:

PERISHABLE AGRICULTURAL COMMODITIES ACT (Cont.)

Reparation Default Orders Cont.:

PERISHABLE AGRICULTURAL COMMODITIES ACT (Cont.)

Reparation Default Orders Cont.:

PERISHABLE AGRICULTURAL COMMODITIES ACT (Cont.)

Reparation Default Orders Cont.:

PAGE

PERISHABLE AGRICULTURAL COMMODITIES ACT (Cont.)

Reparation Default Orders Cont.:

PLANT QUARANTINE ACT

CONSENT DECISIONS

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DECISION AND ORDER

TABLE OF CONTENTS

Preliminary Warning

A "Surgeon General's" type of warning is necessary here! Petitioners and the ALJ have quoted bits and pieces of a lengthy administrative decision (set forth in its entirety in Finding 5, *infra*, pp. 21-66), in a manner which fails to reveal or address the essential basis for the Secretary's action challenged here. In fact, the ALJ brushes aside the essential basis for the Secretary's action, as stated by the Secretary, and then proceeds to find his own (erroneous) version of what he thought the Secretary was doing to be unsupported by evidence and not authorized by the statute.

There is no shortcut to judicial review of the Secretary's decision. Every word of the Secretary's decision must be read, and then the entire decision must be reread (perhaps a number of times), in order to see *precisely* what the Secretary found as facts, and what (reasonable) inferences or conclusions he drew from the subsidiary facts. A *thorough* understanding of the Secretary's decision actually makes review easier, since the vital subsidiary findings necessary to support the Secretary's ultimate findings or conclusions are not even challenged by petitioners. Accordingly, I have not read any of the hearing record upon which the Secretary's findings are based.

Preliminary Statement

Section 8c(5)(A) of the Agricultural Marketing Agreement Act of 1937 as amended, authorizes the Secretary of Agriculture to classify milk in accordance with the form in which it is used by a milk handler (e.g., Class I milk is milk sold as fluid milk; Class II is sold as "soft" products, such as cottage cheese; and Class III is sold as "hard" products, such as butter), and to fix "minimum prices for each such use classification which all handlers shall pay . . . for milk purchased from producers" (7 U.S.C. § 608c(5)(A)). "Such prices shall be uniform as to all handlers, subject only to adjustments for . . . (3) the locations at which delivery of such milk . . . is made to such handlers" (*id.*)[1] That adjustment, called a "location adjustment," is used to compensate

[1]*See generally* Vetne, Federal Marketing Order Programs, in 1 Davidson, Agricultural Law § 2.35 (1981 and 1987 Cum. Supp.); Brooks, *The Pricing of Milk Under Federal Marketing Orders* 26 Geo. Wash. L. Rev. 181 (1958).

producers for hauling costs incurred in delivering bulk milk to a handler located a considerable distance from the production area (which is the situation involved here). Conversely, it is used to reduce the price paid to producers who deliver bulk milk, e.g., to a supply plant located a considerable distance from the consumption center, thereby causing the handler to incur extra hauling costs in delivering packaged milk to the consumption center.

This is a proceeding under § 8c(15)(A) of the Act (7 U.S.C. § 608c(15)(a)). Petitioners are "handlers" of milk under Order No. 126 (7 C.F.R. § 1126 *et seq.*), which regulates the handling of milk in the Texas Marketing Area. Petitioners instituted this action to challenge an amendment to the Order effective May 1, 1985, which increased by 18¢ per cwt the location adjustment for Class I milk received at plants located in Zone 8 of the Order (which includes Houston and Beaumont, Texas, where petitioners have plants). The amendment requires Zone 8 handlers to pay to the particular producers delivering such milk an additional $1.2 million per year,[2] which is an increase of 1.2% in the total Class I price paid by Zone 8 handlers (Finding 5(tt)).

The earlier location adjustment was computed at a hauling rate of 1.5¢ per cwt per 10 miles, which rate dates back to 1968 (Finding 5(b)). The challenged amendment was computed at a hauling rate of 3¢ per cwt per 10 miles. Petitioners concede that the 3¢ rate does not exceed actual hauling costs.

Safeway Stores, Inc. (a handler in Zone 8), was granted leave to intervene in support of the petition, and Schepps Dairy, Inc. (a handler in Zone 1), and Associated Milk Producers, Inc. (AMPI) (the cooperative that produced and hauled the milk to Zone 8), were granted leave to intervene in opposition to it, to the limited extent permitted by the rules of practice (7 C.F.R. § 900.57). Official notice was taken at that time of the entire rule making record (Docket No. AO 231-A51) which resulted in the challenged amendment of Order No. 126.

On January 24, 1986, Administrative Law Judge Victor W. Palmer (ALJ) (now Chief ALJ) filed an initial decision and order in which he held that the increase in the location adjustment for Zone 8 plants is unlawful. He concluded that the amendment is based upon considerations of over-order prices by AMPI and market alignment not authorized by the Act, lacks substantial record evidence and subjects Zone 8 handlers to arbitrary and discriminatory treatment. He ordered the Market Administrator to take such action as is appropriate to restore petitioners to the circumstances which would have applied without the intervention of the May 1, 1985, increase of the Zone 8 location adjustment.

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[2] The location adjustment money is not "pooled," i.e., it does not increase the "blend" price paid under the order to all producers. Rather, it is used to compensate the particular producers delivering the milk (7 C.F.R. §§ 1126.60-.78).

On April 11, 1986, respondent appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 C.F.R. § 2.35).[3]

Oral argument before the Judicial Officer, which is discretionary (7 C.F.R. § 900.65(b)), was requested, but is denied inasmuch as the case has been thoroughly briefed, and oral argument would seem to serve no useful purpose. However, on July 22, 1987, a Tentative Decision and Order was filed, and all parties and intervenors were afforded an opportunity to file further briefs. The present Decision and Order is identical to the Tentative Decision and Order, except for trivial corrections, and the addition of several pages at the end of the conclusions.

Based upon a careful consideration of the entire record, the relief requested by petitioners is denied, and the petition is dismissed.

Background of the Federal Milk Order Program

The final decision of the Secretary[4] setting forth the findings and conclusions at issue here are lengthy, filling over 11 triple-column pages of the Federal Register. Before undertaking the tedious task of reading the Secretary's decision, it is helpful to be familiar with the background of the Federal milk order program and the statutory provisions involved here. In 1975, when the Secretary merged six existing Texas milk orders into a single order, he rejected a proposal offered by Schepps Dairy, Inc., to increase the same location adjustment that is involved in the present proceeding. Schepps challenged the Secretary's refusal to increase the location adjustment, and the Secretary's refusal was affirmed. *In re Schepps Dairy, Inc.*, 35 Agric. Dec. 1477 (19 76), *aff'd*, No. 76-1984 (D.D.C. Aug. 15, 1977), *aff'd*, 628 F.2d 11 (D.C. Cir. 1979). The background s et forth by the court of appeals in *Schepps Dairy, Inc. v. Bergland*, 628 F.2d 11, 13-17 (1979) (footnotes omitted), is as follows:

> I. HISTORICAL AND ADMINISTRATIVE BACKGROUND
>
> A. Federal Milk-Marketing Orders
>
> For nearly a half-century, the Secretary of Agriculture has pursued a broad and vital role in the establishment of the prices that many handlers pay many producers of milk. The methodology of federal milk price-fixing has roots extending even deeper in our national economic history. As may readily be expected, a brief sketch of the genesis and evolution of federal milk-marketing orders will serve this

[3]The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted* in 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

[4]The term "Secretary," as used herein, refers to individuals to whom the Secretary delegated authority to act for the Secretary.

appeal by placing the legal issues in proper social as well as regulatory perspective. 7/

As everybody knows, raw milk is a highly perishable commodity. Without refrigeration, it is storable for only very brief periods and transportable for only very short distances. In the early 1900's, dairy farmers--"producers" 8/--usually were thus compelled to deal with the one or the very few local milk processors available, who accordingly exercised some degree of monopsony power. 9/ Moreover, the milk industry was characterized by seasonal overproduction; as the Supreme Court has explained,

> [i]n order to meet fluid demand which is relatively constant, sufficiently large herds must be maintained to supply winter needs. The result is oversupply in the more fruitful months. The historical tendency prior to regulation was for milk distributors, 'handlers,' to take advantage of this surplus to obtain bargains during glut periods. 10/

To correct this discrepancy in bargaining power, Congress enacted legislation enabling dairy farmers to form cooperatives to pool their milk and eliminate overproduction. 11/ These cooperatives established classified pricing schemes based on the use to be made of the milk. They priced milk destined for fluid consumption--class I milk--higher than milk slated for manufacture into dairy products such as cheese--class II milk. Though a small part of the price differential might represent cost differences, the bulk was attributable simply to a desire to exploit the relatively inelastic demand for fluid milk without unduly inhibiting the demand for manufactured milk products. 12/ To spread the benefits of this pricing strategy among their members, cooperatives would multiply class I prices by the amount of fluid milk sold, and class II prices by the amount of manufactured milk sold, and divide the sum of these products by the total quantity of milk sold to arrive at the "blend price" its members would receive for delivered milk. 13/

The profitability of this system encouraged dairy farmers to increase their output. It also invited farmers selling a higher percentage of their milk for fluid purposes than the cooperative generally to abandon the pooling arrangement and deal individually, and in this manner to realize more than the blend price. This in turn germinated disputes among cooperatives and handlers who dealt with free-lance farmers, and as a consequence, milk markets became highly unstable during the late 1920's. 14/[5] During the Great Depression,

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[5]In Kessel, *Economic Effects of Federal Regulation of Milk Markets*, 10 J. Law & Econ. 51 52 (1967), reference is made to "milk strikes and the associated violence. . . ."

demand for fluid milk fell, prices declined drastically and the entire cooperative system collapsed, to the farmers' severe detriment. 15/

Congress reacted by passing the Agricultural Adjustment Act of 1933, which established a licensing system designed to "reestablish prices to farmers at a level that will give agricultural commodities a purchasing power . . . equivalent to the purchasing power of agricultural commodities in the base period," which extended from August, 1909, to July, 1914. 16/ To supplement the provisions of that legislation, and to confine the Secretary of Agriculture's authority within the constitutional limits that very recently had been driven home by the Supreme Court, 17/ Congress amended the Agricultural Adjustment Act in 1935. 18/ The 1935 amendments to Section 8(3) of the 1933 Act were basically carried over into Section 8c of the new Agricultural Marketing Agreement Act of 1937, 19/ which largely controls the instant dispute.

The present statutory provisions can be seen as a shoring, with the power of the Federal Government, of the classified pricing scheme initiated by the cooperatives. Not all of the milk industry is federally regulated, however. 20/ Only if producers and handlers so agree, or if two-thirds of the producers or the producers of two- thirds of the output in the area wish, are federal price controls imposed. 21/ In each regulated milk-marketing area, class I and II minimum prices are established. No maximum prices are set; producers are free to bargain with handlers for better deals. 22/

Producers are largely indifferent to whether their milk is used for class I or II purposes, for they receive a blend price. On the other hand, processors must pay at least the minimum class I and II prices. The variance among handlers in the percentages of milk assigned to fluid and manufacturing purposes means that a handler may pay more or less than the producer from whom he is purchasing receives. Any handler who uses more than the average percentage of class I milk must pay the difference over the blend price into a "producers-settlement fund," from which a handler who uses less than the average percentage of class I milk is compensated. 23/

Minimum class I prices, however, are not necessarily uniform across the entire area covered by a milk-marketing order. The requirement of uniform prices is statutorily subject to adjustments "which compensate or reward the producer for providing an economic service or benefit to the handler." 24/ Milk-producing regions covered by an order are often distant from consuming centers, and chief among the adjustments enumerated in the Act is one for "the locations at which delivery of . . . milk . . . is made to . . . handlers." 25/ The location adjustment honors the fact that a handler who receives milk near consuming centers has a more valuable commodity than a handler who takes in milk in an area further out where it is produced cheaply, but who must undertake the burden of transporting the processed

product to consumer markets. 26/ It is the nature of the location adjustment that is the focus of this case.

B. The Texas Marketing Order

In 1973, an association of milk producers proposed that the six then-existing Texas orders be merged. The Secretary solicited comments and additional recommendations from interested parties. Schepps, a handler with a processing plant in Dallas, advocated that the intra-market location adjustment be increased from 1.5 cents per hundredweight (cwt.) of milk per ten miles of transportation to 2.2 cents per cwt. for every ten miles thereof.

In 1975, the Secretary determined that the separate Texas orders should indeed be consolidated. 27/ He also decided that the base class I minimum price for the Texas area should continue to be set by the same methodology utilized before. 28/ The base Texas class I price, like base class I prices throughout the Nation, is a function of the current price of manufacturing milk in Minnesota and Wisconsin, 29/ the most fertile and efficient milk-producing region in the United States. Producers in the northern parts of those states find it profitable to remain unregulated, and the price their manufacturing milk commands is known as the "M-W [Minnesota-Wisconsin] price." 30/ To insure that class I prices are aligned across the country, class I prices in a particular order approximate the sum of the M-W price [which is defined as the "basic formula price" in the Order (7 C.F.R. § 1126.51)] and the [Class I price differential, which generally equals the] transportation costs [at 1.5¢ per cwt. per 10 miles] from Minnesota-Wisconsin [i.e., from Eau Claire, Wisconsin, for the orders east of the Rocky Mountains (51 Fed. Reg. 40,176, 40,177 (1986)] to the area covered by the order. 31/

In the area to which the Texas order pertains, milk production is most efficient around Dallas. In 1975, the Secretary set the class I price in Dallas at the M-W price plus $2.32 per cwt. [7 C.F.R. § 1126.50(a)], the preexisting estimate of transportation costs from Minnesota and Wisconsin. 32/ This figure was designed to "result in returns to producers sufficient to insure an adequate, but not excessive, supply of pure and wholesome milk for the market." 33/

Within the Texas market, location adjustments were based on similar principles. The Secretary adopted a zone system under which the minimum price paid by a handler increases proportionately to the handler's distance from the Dallas producing area. Under the present order, handlers located in the Houston zone [Zone 8] must pay 36 cents over the Dallas [Zone 1] minimum price. 34/ [Handlers in Zone 1, the "base" zone, pay no location adjustment.] Under Schepps' plan, Houston handlers would face minimum prices 53 cents over the Dallas

class I minimum price. 35/ Schepps markets over half of its milk in Houston, so its proposal had the single object of raising its competitors' costs. 36/

The Secretary adhered to a transportation rate of 1.5 cents per cwt. per ten miles in establishing the zone rates, over Schepps' objections that transportation costs are 2.2 cents per cwt. per ten miles. The Secretary, acknowledging that the adjustment may not fully compensate for rising transportation costs, 37/ explained his refusal to adopt Schepps' figure:

> The Class I price structure under the Texas order is not intended to assure each handler in the market that he will have cost compatibility at any location at which he may choose to distribute milk. Its purpose is to assure handlers, and ultimately consumers, of an adequate milk supply. There has been a reasonable demonstration that the present pattern of milk prices throughout the Texas area has attracted sufficient, but not excessive, raw milk supplies to handlers operating in the various parts of the State. Local considerations do suggest certain price changes at specific locations, and these have been dealt with in this decision. Nevertheless, the supply-demand balance in the market does not warrant a major restructuring of prices that necessarily would result if prices were to reflect a higher transportation rate. 38/

Relevant Provisions of the Regulations

The location adjustments for handlers in effect immediately prior to the 1985 amendment at issue here provided (7 C.F.R. § 1126.52(a) (1985)):

§ 1126.52 Plant location adjustments for handlers.

(a) For milk received at a plant from producers or a handler described in § 1126.9(c) [i.e., cooperative associations] and which is classified as Class I milk without movement in bulk form to a pool distributing plant at which a higher Class I price applies, the price specified in § 1126.50(a) [i.e., the Class I price] shall be adjusted by the amount stated in paragraph (a)(1) through (7) of this section for the location of such plant:

(1) For a plant located within one of the zones set forth in § 1126.2, the adjustment shall be as follows:

	Adjustment per hundredweight
Zone 1	No adjustment.
Zone 1-A	Minus 12 cents.
Zone 2	Plus 6 cents.
Zone 3	Plus 15 cents.
Zone 4	Plus 18 cents.
Zone 5	Plus 20 cents.
Zone 6	Plus 25 cents.
Zone 7	Plus 30 cents.
Zone 8	Plus 36 cents.
Zone 9	Plus 42 cents.
Zone 10	Plus 53 cents.
Zone 11	Plus 66 cents.
Zone 12	Plus 75 cents.

(2) For a plant located in any of the following Texas counties, the adjustment shall be as follows:

(i) Plus 10 cents.

Bailey, Castro, Cochran, Cottle, Crosby, Dickens, Floyd, Gaines, Garza, Hale, Hockley, Lamb, Lubbock, Lynn, Motley, Parmer, Terry, Yoakum.

(ii) Minus 7 cents.

Armstrong, Briscoe, Carson, Childress, Collingsworth, Dallam, Deaf Smith, Donley, Gray, Hall, Hansford, Hartley, Hemphill, Hutchinson, Lipscomb, Moore, Ochiltree, Oldham, Potter, Randall, Roberts, Sherman, Swisher, Wheeler.

(3) For a plant located in any of the following Oklahoma counties, the adjustment shall be as follows:

(i) Minus 24 cents.

Comanche, Cotton, Jefferson, Stephens, Tillman.

(ii) Minus 27 cents.

Carter, Love, Marshall.

(iii) Minus 28 cents.

Beckham, Greer, Harmon, Jackson.

(iv) Minus 34 cents.

Caddo, Canadian, Cleveland, Garvin, Grady, Johnston, Kiowa, McClain, Murray, Oklahoma, Pontotoc, Pottawatomie, Seminole, Washita.

(v) Minus 44 cents.

Alfalfa, Beaver, Blaine, Cimarron, Craig, Creek, Custer, Delaware, Dewey, Ellis, Garfield, Grant, Harper, Kay, Kingfisher, Lincoln, Logan, Major, Mayes, Noble, Nowata, Okfuskee, Okmulgee, Osage, Ottawa, Payne, Pawnee, Roger Mills, Rogers, Texas, Tulsa, Wagoner, Washington, Woods, Woodward.

(4) For a plant located in Bowie or Cass County, Texas, or in Little River or Miller County, Arkansas, the adjustment shall be minus 9 cents;

(5) For a plant located in the States of Louisiana or New Mexico or in El Paso County, Texas, no adjustment shall apply;

(6) For a plant located in the State of Texas but outside any area described in paragraphs (a)(1) through (5) of this section, the adjustment shall be the adjustment applicable at Corpus Christi, Midland, San Angelo, or San Antonio, Texas, whichever city is nearest; and

(7) For a plant located outside the areas described in paragraphs (a)(1) through (6) of this section, the adjustment shall be minus 1.5 cents per hundredweight for each 10 miles or fraction thereof that such plant is located from the Dallas, Texas, city hall, such distance to be based on the shortest hard-surfaced highway distance as determined by the market administrator.

The amendment effective May 1, 1985, at issue here provides (50 Fed. Reg. 12,766 (1985)):

1. In § 1126.52(a)(1), the adjustment per hundredweight for Zone 8 is changed from "Plus 36 cents" to "Plus 54 cents".

§ 1126.52 Plant location adjustments for handlers.

(a) * * *

(1) * * *

	Adjustment per hundredweight
Zone 8	Plus 54 cents.

The zones referred to in the regulations are shown on the map set forth on the following page (EX 6, Fig. I, p. 3).

Map (EX 6, Fig. I, p. 3)

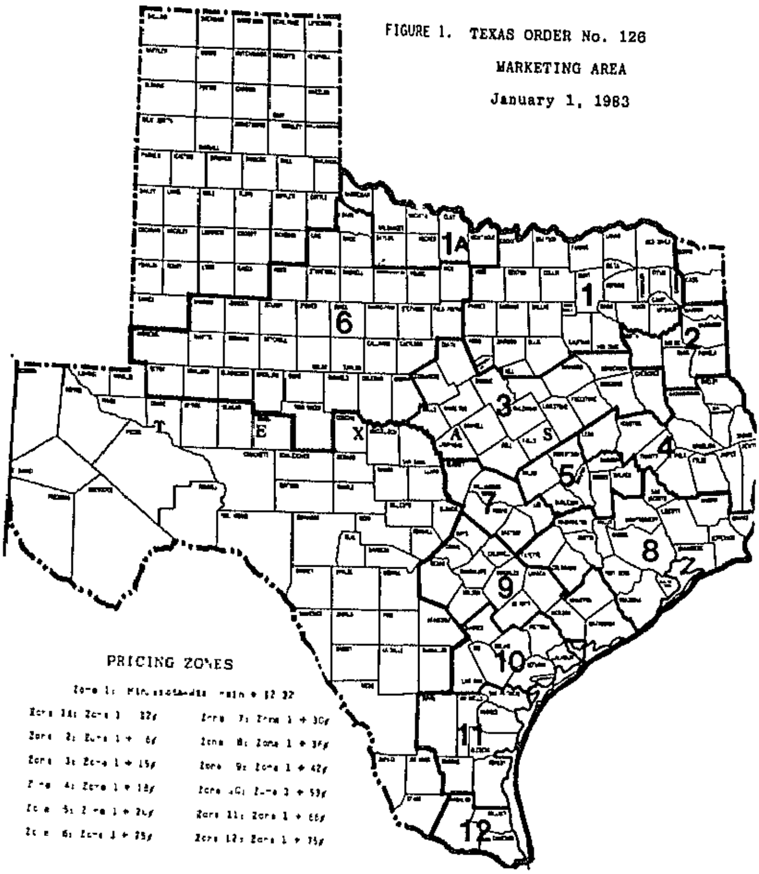

FIGURE 1. TEXAS ORDER No. 126
MARKETING AREA
January 1, 1983

Under the amendment, handlers in Zone 8 (which includes Houston and Beaumont, Texas), who previously were required to pay 36¢ per hundredweight over the Class I price for their milk, were required to pay 54¢ per hundredweight over the Class I price, or an additional 18¢ per hundredweight. This additional 18¢ per hundredweight (and, in fact, the entire location adjustment) is not paid into the pool to increase the blend price to all producers but, rather, is paid to the particular producers delivering milk to the handlers in Zone 8 (7 C.F.R. § § 1126.60-.78).

Relevant Provisions of the Statute

The Act expressly provides that the "uniform," minimum prices paid by handlers are subject to "adjustments" for "the locations at which delivery of such milk, or any use classification thereof, is made to such handlers" (7 U.S.C. § 608c(5)(A)(3)). Similarly, the Act expressly provides that the "uniform" prices paid to producers is subject to "adjustments" for "the locations at which delivery of such milk is made" (7 U.S.C. § 608c(5)(B)(ii)(c)). The relevant statutory provisions are as follows (7 U.S.C. § § 602(1), (4), 608c(1), (3), (4), (5)(A), 5(B), 5(F), (11)(B), (15), (17), (18), 610(b) (emphasis added)):

§ 602. Declaration of policy; establishment of price basing period; marketing standards; orderly supply flow; circumstances for continued regulation

It is declared to be the policy of Congress--

(1) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such *orderly marketing conditions* for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices as defined by section 1301(a)(1) of this title.

. . . .

(4) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such *orderly marketing conditions* for any agricultural commodity enumerated in section 608c(2) of this title [which includes milk] as will provide, in the interests of producers and consumers, an orderly flow of the supply thereof to market throughout its normal marketing season to avoid unreasonable fluctuations in supplies and prices.

. . . .

§ 608c. Orders regulating handling of commodity

(1) Issuance by Secretary

The Secretary of Agriculture shall, subject to the provisions of this section, issue, *and from time to time amend*, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this chapter as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

. . . .

(3) Notice and hearing

Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of this chapter with respect to any commodity or product thereof specified in subsection (2) of this section [which includes milk], he shall give due notice of and an opportunity for a hearing upon a proposed order.

(4) Finding and issuance of order

After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of this chapter with respect to such commodity.

(5) Milk and its products; terms and conditions of orders

In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers:

(B) Providing:

. . . .

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered;

subject, in either case, *only to adjustments for* (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) *the locations at which delivery of such milk is made*, (d) a further adjustment to encourage seasonal adjustments in the production of milk through equitable apportionment of the total value of the milk purchased by any handler, or by all handlers, among producers on the basis of their marketings of milk during a representative period of time, which need not be limited to one year, and (e) a provision providing for the accumulation and disbursement of a fund to encourage seasonal adjustments in the production of milk may be included in an order.

. . . .

(F) Nothing contained in this subsection is intended or shall be construed to prevent a cooperative marketing association qualified under the provisions of sections 291 and 292 of this title, engaged in making collective sales or marketing of milk or its products for the producers thereof, from blending the net proceeds of all of its sales in all markets in all use classifications, and making distribution thereof to its producers in accordance with the contract between the association and its producers: *Provided*, That it shall not sell milk or its product s to any handler for use or consumption in any market at prices less than the prices fixed pursuant to paragraph (A) of this subsection for such milk.

. . . .

(11) Regional application

. . . .

(B) Except in the case of milk and its products, orders issued under this section shall be limited in their application to the smallest regional production areas or regional marketing areas, or both, as the case may be, which the Secretary finds practicable, consistently with carrying out such declared policy.

. . . .

(15) Petition by handler for modification of order or exemption; court review of ruling of Secretary

(A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(B) The District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 608a(6) of this title. Any proceedings brought pursuant to section 608a(6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection (15)) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15).

. . . .

(17) Provisions applicable to amendments

The provisions of this section and section 608d of this title applicable to orders shall be applicable to amendments to orders: *Provided*, That notice of a hearing upon a proposed amendment to any order issued pursuant to this section, given not less than three days prior to the date fixed for such hearing, shall be deemed due notice thereof; *Provided further*, That if one-third or more of the producers as defined in a milk order apply in writing for a hearing on a proposed amendment of such order, the Secretary shall call such a

hearing if the proposed amendment is one that may legally be made to such order. Subsection (12) of this section shall not be construed to permit any cooperative to act for its members in an application for a hearing under the foregoing proviso and nothing in such proviso shall be construed to preclude the Secretary from calling an amendment hearing as provided in subsection (3) of this section. The Secretary shall not be required to call a hearing on any proposed amendment to an order in response to an application for a hearing on such proposed amendment if the application requesting the hearing is received by the Secretary within ninety days after the date on which the Secretary has announced the decision on a previously proposed amendment to such order and the two proposed amendments are essentially the same.

(18) Milk prices

The Secretary of Agriculture, prior to prescribing any term in any marketing agreement or order, or amendment thereto, relating to milk or its products, if such term is to fix minimum prices to be paid to producers or associations of producers, or prior to modifying the price fixed in any such term, shall ascertain the parity prices of such commodities. The prices which it is declared to be the policy of Congress to establish in section 602 of this title shall, for the purposes of such agreement, order, or amendment, be adjusted to reflect the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk or its products in the marketing area to which the contemplated marketing agreement, order, or amendment relates. Whenever the Secretary finds, upon the basis of the evidence adduced at the hearing required by section 608b of this title or this section, as the case may be, that the parity prices of such commodities are not reasonable in view of the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk and its products in the marketing area to which the contemplated agreement, order, or amendment relates, he shall fix such prices as he finds will reflect such factors, insure a sufficient quantity of pure and wholesome milk to meet current needs and further to assure a level of farm income adequate to maintain productive capacity sufficient to meet anticipated future needs, and be in the public interest. Thereafter, as the Secretary finds necessary on account of changed circumstances, he shall, after due notice and opportunity for hearing, make adjustments in such prices.

. . . .

§ 610. Administration

. . . .

(b) <u>State and local committees or associations of producers; handlers' share of expenses of authority or agency</u>

(1) The Secretary of Agriculture is authorized to establish, for the more effective administration of the functions vested in him by this chapter, State and local committees, or associations of producers, and to permit cooperative associations of producers, when in his judgment they are qualified to do so, to act as agents of their members and patrons in connection with the distribution of payments authorized to be made under section 608 of this title. The Secretary, in the administration of this chapter, shall accord such recognition and encouragement to producer-owned and producer- controlled cooperative associations as will be in harmony with the policy toward cooperative associations set forth in existing Acts of Congress, and as will tend to promote efficient methods of marketing and distribution.

Findings of Fact

1. A public hearing was held on October 4-7, 1983, in Irving, Texas, to consider various proposed amendments to Order No. 126, regulating the handling of milk in the Texas marketing area. Two of the proposed amendments were submitted by intervenor Schepps Dairy, Inc., to increase the difference between the minimum order prices applicable at plants located in southern portions of Texas (primarily Zone 8, which includes Houston) over those applicable at northern plants (primarily Zone 1, which includes Dallas). The 1983 hearing was held pursuant to a notice of hearing published September 1, 1983 (48 Fed. Reg. 39,643 (1983)). At the close of the oral hearing, interested parties were given an opportunity to file briefs, and petitioners and intervenor Schepps Dairy, Inc., did so.

2. Schepps offered two proposals to revise the pricing structure of Order No. 126 for consideration in the 1983 rule making proceedings. One of the proposals would have moved the base zone (in which no location adjustment is paid) from Zone 1 (Dallas) southward, reducing the Class I price in Zone 1 and, to a lesser extent, in Zones 2 through 5, while adding direct-delivery differentials to the adjusted Class I prices applicable in Zones 8 and 9 of 18¢ and 6¢, respectively. As an alternative to this proposal, Schepps made a second proposal that plants located in Zones 2 through 12 pay direct-delivery differentials to their dairy farmer suppliers of 10¢ per cwt in Zones 2 through 5, and of 5¢ per cwt in Zone 6, 19¢ in Zone 7, 36¢ in Zone 8, 23¢ in Zone 9, and 19¢ per cwt in Zones 10, 11 and 12.

3. On May 14, 1984, C. W. McMillan, Assistant Secretary, Marketing and Inspection Services, issued a Partial Final Decision, based on the same 1983 hearing record at issue here, in which he denied a proposal to temporarily reduce (during the months of December 1983 and March through June 1984) the Class III price level for producer milk used to make butter, nonfat dry milk and cheddar cheese (49 Fed. Reg. 20,825, 20,825-31 (1984)).

On October 25, 1984, William T. Manley, Deputy Administrator, Marketing Programs, Agricultural Marketing Service, United States Department of Agriculture, issued a recommended decision that increased by 18¢ per cwt the added differential operators of milk plants in Zone 8 (which includes Houston) would be required to pay above the Class I price

payable for milk received at plants in Zone 1 (which includes Dallas), i.e., he recommended that the location adjustment for Zone 8 be changed from plus 36¢ per cwt to plus 54¢ per cwt (49 Fed. Reg. 43,691 (1984)). The recommended decision gave all interested parties the opportunity to file exceptions to its findings and conclusions, and all petitioners and the intervenors Safeway Stores and Schepps did file exceptions.

4. On March 6, 1985, Karen Darling, Acting Assistant Secretary, Marketing and Inspection Services, United States Department of Agriculture, issued a final decision published on March 11, 1985, which amended Order No. 126's Zone 8 location adjustment as recommended, for the reasons stated by the Deputy Administrator (50 Fed. Reg. 9661 (1985)). The Secretary's final decision received producer approval and became effective on May 1, 1985 (50 Fed. Reg. 12,765 (1985)).

5. The relevant portions of the Secretary's final decision increasing the location adjustment for Zone 8 by 18¢ per cwt are reproduced verbatim, in their entirety, in this finding. However, to aid the reader, the Secretary's final decision has been divided into 48 subsections by the Judicial Officer, with a brief summary by the Judicial Officer preceding each subsection.

(a) The Secretary's decision outlines Schepps' proposals to increase the difference between minimum prices at Dallas and Houston, as follows (50 Fed. Reg. at 9661-62):

> The material issues on the record relate to:
>
> . . . .
>
> 3. The Class I price level and location adjustments within the marketing area.
>
> 4. The Class II price level and location adjustments within the marketing area.
>
> 5. Location adjustments applicable for milk delivered to plants located outside the marketing area.
>
> . . . .
>
> <u>Findings and Conclusions</u>
>
> The following findings and conclusions on the material issues are based on evidence presented at the hearing and the record thereof:
>
> <u>Background for Pricing Proposals Concerning Material Issues 3, 4, and 5</u>
>
> Schepps Dairy, Inc. (Schepps), which operate[s] a pool distributing plant in Dallas, offered and supported proposals to revise the pricing structure under the Texas order. Generally, the proposals are intended

to increase the difference between minimum order prices applicable at plants located in northern portions of the marketing area (primarily Dallas) and southern portions of the marketing area (primarily Houston) because of increases in the cost of hauling milk. These proposals (proposals 3 and 4 as contained in the Notice of Hearing) included a restructuring of Class I location adjustments applicable inside and outside the marketing area; the implementation of direct-delivery differentials in certain pricing zones in conjunction with or as an alternative to a revision of Class I location adjustments; and the implementation of plus location adjustments for milk in Class II uses in certain pricing zones. These proposals are the subject of material issues 3, 4, and 5 as set forth previously. The proposal[s] are included as a group in this background discussion because the proponent presented them as alternative means for dealing with a common problem. In addition, opposing parties viewed the pricing proposals as a unit. This discussion contains background information on pricing issues in the Texas market and the basic arguments presented by proponents and opponents. A more detailed examination of each of the material issues follows this background discussion.

(b) The Secretary's decision explains that the location adjustments in the current merged order maintain the same pricing structure that existed under the six separate orders, with the 36¢ difference between Dallas and Houston representing the cost of transporting bulk milk from Dallas to Houston based on a transportation rate of 1.5¢ per cwt per 10 miles (dating back to 1968), as follows (50 Fed. Reg. at 9662):

> The current zone pricing structure under the Texas order dates to the July 1, 1975, merger of six smaller markets into the Texas marketing area. Official notice was taken of the Assistant Secretary's decision of May 2, 1975 (40 FR 20004) that accomplished this action. For pricing purposes, the Texas marketing area was divided into 12 pricing zones. Location adjustments were specified for each zone (groups of counties) that resulted in Class I prices that were essentially the same as the prices applicable in such areas under the formerly separate marketing orders. Zone 1 (which includes the Dallas/Ft. Worth area) was established as the basing point at which location the Class I price to handlers and the blend price to producers are announced each month. A zero location adjustment applies to plants in Zone 1 and the Class I price is the Minnesota-Wisconsin price for the second preceding month plus $2.32 per hundredweight. Plus adjustments to the Zone 1 price were established for each succeeding zone, ranging from plus 6 cents in Zone 2 (Tyler, Marshall) to plus 75 cents in Zone 12 (Edinburg, Harlingen). The plus adjustments apply to milk used in fluid milk products (Class I uses) by plants in each zone as well as to the blend price payable to producers whose milk is received in each zone. It is note[d] that a thirteenth zone (Zone 1-A) was added to the marketing area effective January 1, 1983. The plant location adjustment in Zone 1-A is minus 12 cents from the Zone 1

price and is identical to the location adjustment applicable to such area under the Texas order prior to its inclusion in the marketing area.

The current zone pricing system under the order results in increasing, from North to South Texas, minimum order Class I prices to handlers and blend prices payable to producers. The price differences among the various cities in the marketing area were unchanged (with some minor exceptions) by the merger of the marketing areas. Consequently, the current 36-cent Class I price difference between Dallas and Houston dates to the 1968 decision that implemented the South Texas milk order effective October 1, 1968. This price difference represented the cost of transporting bulk milk from Dallas to Houston based on a transportation rate of 1.5 cents per hundredweight per 10 miles. Official notice is taken of the Under Secretary's final decision issued August 8, 1968 (33 FR 11486) to implement the South Texas order. A review of this decision indicates that the same transportation rate was used to establish Class I prices under the former San Antonio, Austin-Waco and Corpus Christi orders. The Class I prices under these orders reflected the Class I price under the North Texas order plus 1.5 cents per hundredweight for each 10 miles between Dallas and the various basing points under the respective other orders.

(c) The Secretary's decision explains that in 1975, proposals to increase Class I prices and location adjustments were denied because of the supply-demand relationship for the combined markets, but that the Secretary recognized in 1975 the "need to maintain an adjustment of Class I prices among the various consumption centers within the marketing area to reflect the economic service performed in moving milk to such consumption centers from the heavy production areas in North Texas," as follows (50 Fed. Reg. at 9662):

> The 1975 merger decision considered various proposals to increase Class I prices throughout the market and to change the relative price relationship between certain zones within the marketing area. One proposal would have increased the Class I price applicable at plants in the base zone (Zone 1-Dallas/Ft. Worth) by 58 cents per hundredweight. This proposal reflected the Class I price applicable at Eau Claire, Wisconsin, plus an adjustment for transportation to Dallas at 2 cents per hundredweight per 10 miles rather than the traditional 1.5-cent rate. Another proposal would have altered the location adjustments within the marketing area to reflect a transportation rate of 2.2 cents per 10 miles, which would have increased the Class I price difference between Dallas and other cities in the marketing area.
>
> The 1975 merger decision acknowledged the fact that transportation costs had increased since 1968. However, the decision stated that market supply-demand conditions must be considered along

with the cost of transporting milk from distant supply areas when determining the appropriate minimum order Class I price. The Assistant Secretary concluded that in spite of some increases in hauling costs, raw milk supplies were being made available to handlers in all parts of the marketing area and that substantial quantities of raw milk were being moved from the North Texas supply area to the consumption centers in South Texas. Thus, the decision concluded that the supply-demand relationship for the combined markets indicated that the prevailing Class I price structure was bringing forth an adequate, but not excessive, supply of milk for consumers. A high[er] minimum price level could stimulate additional production, not needed for fluid use, thereby resulting in a misallocation of agricultural resources. The decision also set forth, in substantial detail, the need to maintain an alignment of Class I prices among the various consumption centers within the marketing area to reflect the economic service performed in moving milk to such consumption centers from the heavy production areas in North Texas. Particularly noteworthy with respect to this proceeding was the conclusion that there was a greater economic service provided by producers for San Antonio area handlers than Houston area handlers since San Antonio is further from the North Texas supply area than is Houston.

(d) The Secretary's decision describes Schepps' proposals "to restor price uniformity among producers and handlers by having order prices refle the cost of transporting milk to plants located in deficit supply areas of th market [in South Texas]," as follows (50 Fed. Reg. at 9662-63):

> In this proceeding, Schepps makes some of the same arguments that were presented in 19[75] to attempt to justify increasing location adjustments to reflect a higher transportation rate than 1.5 cents per hundredweight per 10 miles. The stated objectives of Schepps' proposals is to restore price uniformity among producers and handlers by having order prices reflect the cost of transporting milk to plants located in deficit supply areas of the market. Schepps contends that since the present zoned Class I price structure does not cover the cost of hauling milk, market forces establish prices that are not uniform among either handlers or producers. Specifically, Schepps contends that the market price structure allows handlers in South Texas to obtain milk supplies at prices that do not reflect the full cost of transporting milk from the North Texas supply area. As a result, Schepps contends that producers are subsidizing in part the cost of the economic service they provide in shipping milk substantial distances to South Texas plants and, consequently, returns to producers are not uniform. Also, Schepps contends that the prices paid for milk in Class I uses by North Texas handlers are also used to subsidize, in part, the cost of moving milk to South Texas plants with whom North Texas handlers compete for sales of fluid milk products in South Texas. Schepps concludes that the resulting nonuniformity of prices to handlers and returns to producers are inconsistent with the requirements of the Agricultural Marketing Agreement Act of 1937,

as amended; represent disorderly marketing conditions; and are the direct result of the failure of the order minimum price structure to reflect the cost of transporting milk.

(e) The Secretary's decision outlines numerous objections made by other handlers to Schepps' proposals, including objections that adequate supplies of milk are now being made available in South Texas, and that Schepps' similar proposal in 1975 was rejected, with court approval, as follows (50 Fed. Reg. at 9663):

> Schepps' pricing proposals were opposed by a large number of handlers who are regulated under the order. In total these handlers (The Southland Corporation; Borden, Inc.; Carnation Company; Foremost Dairies, Inc.; Blue Bell Creamery; H. E. Butt Grocery Company; Hygeia Dairy Company, Inc.; and Safeway Stores, Inc.) operate 22 of the 34 distributing plants that are fully regulated under the order. Such handlers also operate at least 13 other plants that distribute fluid milk and dairy products within the Texas marketing area and seven nonpool plants at which milk pooled under the Texas order is processed into Class II products.
>
> These handlers contended that the proposals should be denied because the proposed price adjustments: (1) would result in substantial cost increases to South Texas area handlers and consumers and generally discriminate against South Texas handlers; (2) would disrupt competitive conditions among handlers by distorting the inter- and intra-order alignment of prices; (3) are unrelated to any competent testimony that could establish the cost of hauling milk and, further, are inconsistent with any argument that hauling costs have increased because of proposed price reductions in North Texas areas; (4) are unnecessary because adequate supplies of milk are being made available to handlers throughout the entire market; (5) would not benefit producers, and further, were not supported by producers who proponent claims are subsidizing the cost of hauling milk to South Texas plants; and (6) cannot be adopted because the Department failed to comply with the requirements of the Regulatory Flexibility Act prior to the hearing.
>
> Basically, opponents argue that adequate supplies of milk are being made available to all handlers throughout the marketing area under the current pricing structure in the market. They contend that since there is an adequacy of supply, and that milk is moving substantial distances under the current price structure, there is no basis upon which the Secretary can justify a price increase in South Texas areas. They further contend that the purpose of the proposals is nothing more than an attempt to improve proponent's competitive position with respect to packaged fluid milk sales in certain South Texas areas (primarily San Antonio and Houston) that account for about one-half

of proponent's total fluid milk sales. Consequently, opponents contend that the purpose of the proposals is the same as that advanced by the same proponent at the hearing to merge six marketing areas under the Texas order, and that the proposals should be denied on the same basis as set forth by the Assistant Secretary in denying similar proposals in the 1975 merger decision. In this regard, opponents cite the decision's conclusion concerning the need to maintain Class I price alignment among Federal order markets and within the Texas market on the same basis, as well as the finding that milk moved substantial distances to meet all handlers' needs despite the fact that hauling costs exceeded the transportation rate reflected under the order. Opponents point out that the rational[e] advanced in the 1975 decision was upheld in *Schepps Dairy, Inc. v. Bergland*, 628 F.2d 11, (D.C. Cir. 1979).

Opponents further contend that the issue raised by Schepps is one that primarily affects milk producers who pay the cost of hauling milk to plants. They point out that no producers or their cooperative associations supported Schepps' proposal. In this regard, Mid-America Dairymen, Inc., (Mid-Am) opposed those parts of the proposal that would reduce prices in Zone 1 (Base Zone) and at Aurora, Missouri. Mid-Am represents producers who are located in Zone 1 and the cooperative also operates a supply plant that is located at Aurora, Missouri, that is pooled under the Texas order. Mid-Am contends that the proposed lower price for these areas would reduce milk production in such areas, thus jeopardizing the maintenance of milk supplies that are necessary to meet the fluid milk needs of southern deficit production areas. Mid-Am also contended that the proposed lower Zone 1 price would disrupt the price alignment among Federal order markets and that if any such price reduction is to be pursued it should be considered on a broader scale to consider the Class I price alignment with surrounding markets. Mid-Am contends that if a price incentive is necessary to attract milk to deficit southern areas, it should be accomplished by increasing prices in such areas rather than by reducing prices in Zone 1. Several nonmember producers also opposed any price reduction in Zone 1.

Associated Milk Producers, Inc. (AMPI), a cooperative association that represents a substantial majority of the dairy farmers who furnish milk to handlers located throughout the marketing area, presented no estimony and took no position either in support of or in opposition to he proposed pricing changes in the marketing area. In its brief, AMPI opposed the changes in location adjustments at plants located outside the marketing area. One other interested party who operates a pool distributing plant in Zone 1-A (Preston Dairy) supported increasing the location adjustments under the order for deficit supply areas in the south to recognize increases in transportation costs that have occurred since the 1960's. One additional handler, Land O'Pine Dairy, who operates a pool distributing plant at Lufkin (Zone 4), proposed that Zones 2 and 4 be included in the same pricing zone. The handler stated that the basis for this modification is to improve his competitive

position with respect to plants located in Zone 2 that now have a 12-cent lower Class I price under the order than applies to Zone 4.

(f) The Secretary's decision concludes that the Zone 8 location adjustment should be increased by 18¢ to (i) "reflect increases in hauling costs," (ii) "assure an adequate supply of milk for fluid use [in Zone 8]," and (iii) "promote the orderly marketing of the substantial volumes of milk that must be shipped great distances from the major production areas [in North Texas] to meet the fluid milk needs of this deficit supply area [Zone 8]," as follows (50 Fed. Reg. at 9663):

> 3. The Class I price level and location adjustments within the marketing area. The order should be amended to increase the plus location adjustment in Zone 8 (Houston-Beaumont) to 54 cents per hundredweight. The 18-cent per hundredweight increase in the Class I and blend prices is necessary to reflect increases in hauling costs and to assure an adequate supply of milk for fluid use for the largest consumption center in the marketing area and to promote the orderly marketing of the substantial volumes of milk that must be shipped great distances from the major production areas in the market to meet the fluid milk needs of this deficit supply area. No other pricing changes that were proposed should be adopted on the basis of this record.

(g) The Secretary's decision describes Schepps' proposals in greater detail, explaining that, under the proposals, the Class I price difference between Dallas and Houston would be 72¢ or 73¢, compared to the present 36¢, as follows (50 Fed. Reg. at 9663-64):

> As previously stated in the background for the pricing issue, Schepps offered two proposals to revise the pricing structure under the order. One of the proposals would move the base zone (the zone at which location adjustments do not apply) southward from Zone 1 to Zones 3, 4, and 5. The current Class I differential in Zone 1 that is added to the basic formula price to establish the Class I price for the month is $2.32 per hundredweight. Movement of the base zone to the south would result in a reduction of the Class I price in Zones 3, 4, and 5. The proposal would also establish minus location adjustments from the new base zone for Zones 1, 1-A, and 2. Plus adjustments to the new base zone price are proposed for Zones 6 through 12. In conjunction with the location adjustments, Schepps also proposed that direct-delivery differentials be applied to Zones 8 and 9 in the amount of 18 and 6 cents, respectively.
>
> The objective of the proposal is to increase the difference in the order Class I and blend prices between northern and southern portions of the marketing area to reflect increases in the cost of hauling milk. For purposes of illustrating the magnitude of the proposal, the Class

I differentials that would result in each zone are set forth below. Th proposed differentials are compared to the current order Class differentials that apply to plants in each zone as a result of curren order location adjustments. The location adjustments that establis Class I prices at plants in each zone are also used to adjust the blen price to producers for milk received at plants in such zone. Althoug each zone consists of groups of counties, the major cities within suc zones are indicated below for reference purposes.

Class I Differentials

Zone/Cities	Current	Proposed	Difference
	Dollars per hundredweight		
1-A Burkburnett	$2.20	$2.10	-.10
1 Dallas, Ft. Worth	2.32	2.22	-.10
2 Tyler, Marshall	2.38	2.27	-.12
3 Waco	2.47	2.32	-.15
4 Lufkin	2.50	2.32	-.18
5 Bryan	2.52	2.32	-.20
6 Abilene, San Angelo	2.57	2.62	+.05
7 Austin	2.62	2.67	+.05
8 Beaumont, Houston	2.68	2.95	+.27
9 San Antonio	2.74	2.89	+.15
10 Victoria	2.85	2.94	+.09
11 Corpus Christi	2.98	3.07	+.09
12 Edinburg, Harlingen	3.07	3.16	+.09

Schepps presented an alternative to the above proposal that wa advanced by proponent as his preferred method of increasing price in southern areas. This proposal would establish direct-deliver differentials to be paid by plants located in Zones 2 through 12 to their dairy farmer suppliers. Such differentials would apply to all milk received by handlers, regardless of use, and would be applied in addition to the current order location adjustments. For Zones 2 through 5, a direct-delivery differential of 10 cents per hundredweight would be established. A direct-delivery differential of 5 cents, 19 cents, 36 cents, and 23 cents would be established for Zones 6 through 9, respectively. The proposed direct-delivery differentials for Zones 10 through 12 would be 19 cents per hundredweight.

Either of the proposals would significantly increase the effective transportation allowance under the order to move milk from north to south, with particular emphasis on the Houston and San Antonio zones. The proposed Class I price at Houston would be 72 or 73 cents per hundredweight higher than the Class I price at Dallas compared to the 36-cent difference that currently exists. Based on the mileage from Dallas to Houston, the proposed price change would reflect a

transportation rate of about 3 cents per hundredweight per 10 miles compared to the 1.5-cent rate currently reflected under the order. Also, the proposed price difference between Dallas and San Antonio would reflect a transportation rate slightly below 2.5 cents per hundredweight based on the mileage from Dallas to San Antonio.

(h) The Secretary's decision refers to Schepps' evidence that the cost of hauling bulk milk is 3.5¢ to 3.6¢ per cwt per 10 miles, as follows (50 Fed. Reg. at 9664):

Schepps contends that hauling costs have increased significantly since 1968. As evidence to support this claim, Schepps relied upon USDA and university hauling cost studies and changes in indices reported by the Bureau of Labor Statistics that relate to hauling costs. Based on these studies, Schepps contends that a 3.6-cent per hundredweight per [10]-mile hauling rate would be a reasonable approximation of the current cost of hauling bulk milk. Schepps contends that such rate is supported by the company's own experience in shipping packaged fluid milk products. Schepps testified that its current hauling costs for packaged products is 4.1 cents per hundredweight per 10 miles and that, based on comparative studies that indicate about a 15 percent higher cost for packaged than for bulk milk, a 3.6-cent rate is reasonable. Also, Schepps testified that its hauling costs had increased by 267 percent from 1970 to 1982 and that, therefore, the 240 percent proposed increase (from 1.5 cents to 3.6 cents) is appropriate.

Schepps further testified that such transportation rate is supported by the bulk milk hauling costs charged by AMPI that increased from $1.00 per loaded mile to $1.60 per loaded mile from 1978 to 1980. Schepps testified that such cost equates to a rate of 3.52 cents per hundredweight per 10 miles based on the average weight of 45,500 pounds of tank loads of milk received by Schepps from AMPI during August 1 through September 18, 1983. Schepps further contended that the 3.6-cent rate is consistent with the findings of the Assistant Secretary concerning hauling costs in the March 30, 1983, decision concerning the Georgia and certain other milk marketing orders (48 FR 14604).

(i) The Secretary's decision refers to Schepps' arguments and evidence as to producer and handler inequities resulting from the failure of the order to reflect current transportation costs, as follows (50 Fed Reg. at 9664):

Schepps argues that the failure of the order to reflect current transportation costs results in producer and handler inequities that are intensified by the disparate geographic distribution of population and milk production within the Texas marketing area. Schepps presented evidence concerning the population changes that occurred within the current Texas order pricing zones between 1970 and 1980

and statistics from the office of the market administrator. These statistics concern the percentage of milk priced in the various pricing zones that is produced in the major milk producing counties in the market, the relationship of milk production by zone to the volume of bulk milk received by plants in the same zone, the distances that bulk milk moves to supply the needs of fluid milk plants in the various zones, and maps that indicate the changes in the source of supply for the various pricing zones over time.

(j) The Secretary's decision refers to Schepps' testimony and arguments that Associated Milk Producers, Inc. (AMPI), members receive less than noncooperative producers because AMPI absorbs the cost of hauling milk to the Zone 8 deficit area, resulting in nonuniform returns to producers and nonuniform costs to handlers, as follows (50 Fed. Reg. at 9664):

> Schepps' testimony relative to the above statistics addressed primarily the circumstances existing with respect to Houston, (Zone 8). Schepps contends that Zone 8 is extremely deficit in terms of local production, and that substantial quantities of milk must be shipped long distances to meet the fluid milk needs of Zone 8 plants. Schepps points out that more than 50 percent of the bulk fluid milk needs of Zone 8 plants is shipped more than 250 miles and that the per hundredweight cost is 90 cents based on current hauling rates of 3.6 cents per 10 miles. Consequently, Schepps argues that the additional 54 cents in hauling costs that is not reflected in the order (now a 36-cent price difference between Dallas and Houston) is absorbed by producers who supply Zone 8 plants. Since most of such milk is shipped by AMPI, Schepps contends that AMPI is unable to return as high a price to its member producers as are returned to the nonmember producers that are located in the heavy production areas of the market around Sulphur Springs (Hopkins County), despite the fact that AMPI charges in excess of the order's minimum prices to the handlers the cooperative supplies. Schepps contends that handlers in Zone 1 (some of whom also operate plants in Zone 8) are able to purchase milk from nonmember producers at a lesser cost than is charged by AMPI but are able to return a blend price to nonmember producers that is in excess of the order blend because such handlers do not have the burden of subsidizing the cost of transporting milk to deficit southern markets. Consequently, Schepps argues that neither returns to producers nor costs to handlers are uniform as a result of transportation cost subsidization by AMPI that is incurred by supplying deficit southern markets such as Houston.

(k) The Secretary's decision refers to Schepps' evidence and arguments that (i) prior to May 1983, AMPI's over-order premiums reflected a greater amount of the additional transportation costs of shipping milk to Houston, but that since May 1983, only the order's 36¢ difference remains, and (ii) AMPI subsidizes Houston handlers by charging Schepps the Houston price at Schepps' Dallas plant on that portion (about half) of its total sales that are made in Zone 8, i.e., AMPI charges Schepps at Dallas for a

transportation service not received, in order to subsidize Houston, as follows (50 Fed. Reg. at 9665):

> Schepps also presented additional information concerning his actual cost for milk received from AMPI at his Dallas plant as well as comparisons between such cost and a constructed cost for AMPI milk received at Houston on the basis of AMPI price announcements. Schepps notes that prior to May 1983, the difference between AMPI's announced prices at Dallas and Houston reflected a greater amount of the actual, additional transportation cost incurred in shipping milk to Houston. However, Schepps testified that he was charged the Houston price at his Dallas plant on that portion of his total fluid milk sales in Zone 8, which represent about one-half of his total sales. As a result, Schepps contends that he was charged a price that reflected a part of the cost incurred by AMPI in shipping milk to Houston, and that such charge represents a cost for a service Schepps did not receive. In addition, Schepps contends that such charge was in effect used to subsidize the cost of hauling milk to plants in Houston with whom Schepps competes for fluid milk sales in the Houston area. Since May of 1983 Schepps contends that a significant transportation subsidy exists since the over-order pricing structure was revised to result in a price difference of 36 cents between Dallas and Houston.

(l) The Secretary's decision summarizes Schepps' contentions as to lack of uniformity among producers and handlers, as follows (50 Fed. Reg. at 9665):

> As a result of all of the above, Schepps contends that neither costs to handlers nor returns to producers are uniform under current marketing conditions.

(m) The Secretary's decision states that opponent's argument that any disorder resulting from AMPI's pricing practices is a matter between AMPI and Schepps is countered by Schepps' argument that AMPI is unable, because of competitive conditions, to institute an equitable pricing structure, as follows (50 Fed. Reg. at 9665):

> Opponents of the proposal, in addition to their views previously set forth, contend that Schepps' claims of disorder are a result of AMPI pricing practices and are a matter to be settled between AMPI and Schepps. Schepps' counter argument to such claim is that because of competitive conditions in the marketplace, AMPI is unable to institute an equitable pricing structure to reflect the cost of transporting milk that is not provided for under the order.

(n) The Secretary's decision concludes that there is no need to change the overall price level in the market, but that some intra-market price adjustment is necessary in consideration of the value of milk at various

locations that may be necessary to encourage its movement, as follows (50 Fed. Reg. at 9665):

> Resolution of the Class I pricing issue involves the consideration of the overall Class I price level for the market that is necessary to result in an adequate supply of milk for fluid use as well as the differences in the value of milk at various locations within the market that may be necessary to encourage its movement from where it is produced to where it is needed. As indicated hereafter, some intra-market price adjustment is necessary to provide incentives for milk movements. However, there is no indication that the overall price level in the market is inappropriate in terms of the overall market supply/demand relationship.

(o) The Secretary's decision denies Schepps' proposal to reduce th Class I price in the northern production regions of Texas because changes the national price support program should adequately deal with the nation surplus situation, as follows (50 Fed. Reg. at 9665):

> Although the Texas market can be characterized as having a relatively tight supply/demand situation compared to other Federal order markets, the market has experienced a general increase in supplies in recent years that is representative of the national supply situation. For example, the Class I utilization of producer milk for the Texas market declined from 74.5 percent in 1981 to about 69 percent in 1982 and the monthly Class I utilization of producer milk during January through August of 1983 was below the Class I utilization during each of the corresponding months in 1982. In fact, concern with respect to handling the amount of milk available for manufacturing was the issue that was dealt with in a previous decision issued on the record of this proceeding.
>
> Although the market supplies have increased, there has not been a sufficient showing by proponent that the Class I price level should be reduced in the primary northern production regions of the Texas market. In fact, proponent's only attempt to justify the proposed Class I price reduction in northern areas was that such reductions were necessary to offset the proposed price increases in southern portions of the marketing area so that the overall impact on returns to producers would be minimal. This aspect of the proposal, which was opposed by Mid-Am and independent milk producers, could jeopardize the maintenance of adequate supplies of milk in the heavy producing regions of the market that are necessary to meet the fluid milk needs of deficit producing regions of the market. In addition, the proposed Class I price reductions in northern areas would significantly alter the pricing relationship with other Federal order markets whose pricing provisions are not open for consideration on this record.
>
> The price reduction aspect of the proposals must be denied primarily on the basis that there has been no showing that the

> increases in production in recent years are a result of the Class I differential. The recent supply/demand situation in the Texas market is not materially different from the national dairy situation where production has exceeded the demand for dairy products. National production increases have been in response to the price support levels established for manufactured dairy products as well as to other economic factors affecting the production and sale of milk and dairy products. Efforts are currently being taken under the price support program to deal with the surplus situation on a national basis. There is no indication that there need be any further incentive to encourage a reduction of production by reducing the Class I price level under the Texas order. In fact, any further reduction in prices applicable to the major milk production areas of the Texas market, in addition to the efforts being made under the price support program, could jeopardize the maintenance of an adequate supply of milk for current and anticipated future fluid milk needs in the market. Consequently, those portions of Schepps proposals that would reduce prices in certain portions of the market (Zones 1-A through 5) must be denied at this time. Such conclusion thus places a constraint on the remaining consideration of the issue to one of considering what plus adjustments to the base zone price may be necessary.

(p) The Secretary's decision denies Schepps' proposal to establish direct-delivery differentials on top of existing location adjustments because additional returns to producers should be kept to the minimum level necessary to encourage the movement of milk to deficit areas, as follows (50 Fed. Reg. at 9665-66):

> In this regard, there can be no significant increase in returns to producers at this time that would tend to bring forth additional supplies of milk. Such action would be contrary to efforts currently being taken under the price support program to reduce the overall supply of milk on a national basis. Any increase in producer returns that may be necessary must be kept to the minimum level necessary to encourage the movement of milk to deficit areas. In this regard, proponent's preferred option of establishing direct-delivery differentials on top of existing location adjustments would increase producer returns more than any other alternative proposed. It was estimated that the total adoption of such proposal would increase returns to dairy farmers by about $339 thousand to $346 thousand per month. Proponent argues that such an increase would be appropriate because it would not affect the pool value of the milk involved and thus would not increase the blend price since the additional dollars to cover transportation would accrue only to those producers who actually delivered milk to plants located in Zones 2 through 12. However, it is the total impact of the proposal on returns to producers that must be considered, not just the impact on pool proceeds. In this regard, the proposed increase in returns to producers under the direct-delivery

proposal is more than is considered necessary to encourage the movement of milk to deficit supply areas.

A partial application of proponent's direct-delivery differential proposal with respect to certain areas (such as Zones 8 and 9) also should not be adopted. Direct-delivery differentials, as proposed, would apply to all milk delivered by producers directly from farms to plants regardless of whether such milk is utilized in Class I, II, or III uses. Application of such differentials to Class II and III uses at plants in Zones 8 and 9 raises issues with respect to the appropriate price levels of milk in such uses. Although this is discussed more fully under issue number 4, application of such differentials are, to an extent, contrary to the need to maintain a uniform application of the classification and pricing of milk in Class II and Class III uses. Such issues broaden the scope of the proceeding beyond what is necessary to consider the intra-market pricing of milk in fluid uses in the Texas market.

Exceptions filed on behalf of Schepps contend that the implementation of the direct-delivery differential proposal would remove any rational basis for AMPI to continue over-order prices at current levels and, thus, total returns to producers would not be enhanced. There is no basis in the record to support such claim or to alter the conclusion, as hereinafter set forth, that only a minimal price adjustment in Zone 8 is necessary at this time.

(q) The Secretary's decision explains that, overall, Texas has an adequate milk supply, but that certain areas are extremely deficit. The decision explains that if prices are too low in one area, there is a danger it will not be able to procure sufficient milk. The appropriate alignment of prices reflects the difference in the cost of transporting milk to alternative outlets from a common production area, but no adjustments are necessary if ample supplies are likely to continue to be available under orderly marketing practices. The Secretary's decision states (50 Fed. Reg. at 9666):

> Although there are sufficient supplies of milk overall that are associated with the Texas market, certain portions of the market are extremely deficit in terms of local production. As a result, substantial amounts of milk must be shipped long distances to meet the fluid milk needs of certain southern portions of the marketing area. The current order price structure is based on the need to increase prices from north to south and maintains an alignment of prices among plants to provide an incentive for milk to move from where it is produced to the consuming centers where it is needed. In this regard, opponents' contention that they would be placed at a competitive disadvantage in making fluid milk sales relative to plants in northern areas is misplaced. It is true that significant price differences among nearby plants would result in competitive inequities among such plants in selling fluid milk products. However, the primary emphasis with respect to the alignment of prices must be placed on the alignment of

prices among various locations that is necessary to attract a supply of milk to such locations from areas that must be relied upon for sources of supply. If prices are too low at any location relative to another area that relies upon the same source of supply, there is a danger that the lower priced area will not be able to procure a sufficient supply of milk. The appropriate alignment of prices must be a reflection of the difference in the cost of transporting milk to the alternative outlets from a common production area. It is, however, impossible to establish a precise alignment of prices among areas because of the variability in the costs of hauling milk. At best, an alignment of prices usually represents an average of the variable costs of hauling milk that is representative of market experience.

Also, it is not necessary at all times to recognize the average cost of hauling milk to alternative outlets, particularly in areas where, or during periods when, there are substantial supplies of relatively nearby milk available to meet fluid milk needs. In effect, in such situations, milk is made available because of a lack of alternative outlets. No price adjustments are necessary to reflect increased hauling costs if there is sufficient evidence that ample supplies are being made available under orderly marketing practices and under circumstances from which it could be concluded that sufficient supplies of milk are likely to continue to be made available.

(r) The Secretary's decision explains that although all zones are now adequately supplied with milk, there are inequities among producers and handlers not conducive to the orderly marketing of milk that must be transported substantial distances to deficit areas. This could jeopardize the continued movement of milk to the deficit areas. The Secretary's decision states (50 Fed. Reg. at 9666):

The record indicates that milk is moving substantial distances to meet fluid milk needs and that plants operating in the various pricing zones throughout the marketing area appear to be adequately supplied. However, contrary to the views expressed by opponents of any pricing changes, the current adequacy of supply is not the sole basis for determining whether price changes in any area are necessary. The testimony reveals that the market pricing structure, as it currently exists and has been modified during recent years, has resulted in nonuniform returns to producers and nonuniform costs to handlers. These inequities among producers and handlers are not conducive to the orderly marketing of milk that must be transported substantial distances on a continuing basis to meet the fluid milk needs of certain southern deficit areas. A failure to recognize the minimum price adjustments that are necessary could jeopardize the continued movement of milk from northern production areas to southern consumption centers.

(s) The Secretary's decision explains that Zone 8 is the most heavily populated consumption center in Texas (29% of the total), and that Zone 8 is increasing at the fastest rate (of the three dominant consumption centers), as follows (50 Fed. Reg. at 9666):

> The population of the Texas marketing area increased by 28.6 percent from 1970 to 1980. However, there are three dominant consumption centers within the marketing area (Zone 1-Dallas/Ft. Worth; Zone 8-Houston/Beaumont; and Zone 9-San Antonio) that combined, accounted for about 67 percent of the total marketing area population. From 1970 to 1980, the population increase for Zones 1, 8, and 9 was 24.2 [Zone 1], 37.8 [Zone 8] and 20.2 percent [Zone 9], respectively. With the increase in population, Zone 8 accounted for 29 percent of total marketing area population in 1980, surpassing Zone 1 as the most heavily populated area. In 1980, Zone 1 accounted for 27.6 percent of marketing area population, versus 28.5 percent in 1970. Also, Zone 9 accounted for 10.5 percent of total population in 1980, down from 11.2 percent in 1970. All other pricing zones, although representing a relatively small proportion of total population, have shown increases in population from 1970 to 1980, ranging from 2.3 percent in Zone 1-A to 51.2 percent in Zone 12.

(t) The Secretary's decision explains that Zones 8 and 9, which contain the major consumption centers of Houston and San Antonio, are the most deficit zones in Texas, with Zone 8 (Houston) producing only 13.5% of its milk in May 1983, and Zone 9 (San Antonio) producing only 30.8% of its milk. The Secretary's decision states (50 Fed. Reg. at 9666-67):

> The increasing population, particularly in the major population centers in Zones 8 and 9, continues to rely on the major milk producing regions in North Texas for fluid milk needs. The degree to which each of the pricing zones must rely on alternative sources of supply is illustrated by record evidence that compares the milk production within each zone to the actual receipts of bulk fluid milk at distributing plants in each zone. The ratios of production to receipts, in addition to identifying those deficit zones that must rely on alternative sources of supply, identify those zones that contain sufficient reserve supplies for the deficit areas.
>
> On an individual zone basis, the greatest surplus of production relative to individual zone fluid milk receipts is within Zones 3 and 5. During May 1983, production within Zones 3 and 5 represented 2,666 percent and 698 percent, respectively, of the bulk fluid milk received at distributing plants within such zones. During the same month, production within Zones 1-A and 4 represented 210 and 238 percent of the bulk milk receipts at distributing plants within such zones. In Zone 1, which has the greatest volume of production, production represented 145 percent of bulk milk receipts at such plants. Zone 2, which is east of Dallas, is deficit in terms of local production (production was 39 percent of bulk milk receipts) but contains only

2.85 percent of marketing area population and is surrounded by Zones 1, 3, and 4 that have a surplus of production relative to bulk receipts at distributing plants in such zones. Zone 6, which is the West Texas area, including Abilene and San Angelo, is reasonably well balanced in terms of zone production and receipts. In May of 1983, Zone 6 production represented 117 percent of bulk milk receipts, while such ratio was 95 percent in October 1982 when the market supply/demand relationship is tighter.

Collectively, Zones 1-A through 6 of the Texas market contain sufficient supplies of milk in excess of the fluid milk needs of those zones to meet the fluid milk demands of the more southern zones of the marketing area. However, the greatest volume of production is included within Zones 1 and 3, which contain 9 of the top 10 milk producing counties in the Texas marketing area, and which are the nearest alternative sources of supply for the southern pricing zones.

The ratios of zone production to bulk fluid milk receipts at distributing plants illustrate the degree to which Zones 7 through 12 are deficit in terms of zone production. During May of 1983, the ratios of production within each zone to the amount of bulk milk received were 48.4 percent for Zone 7 (Austin), 13.5 percent for Zone 8 (Houston), 30.8 percent for Zone 9 (San Antonio), 44.2 percent for Zone 11 (Corpus Christi), and 42.0 percent for Zone 12 (Edinburg). No ratios were computed for Zone 10 since there are no longer any distributing plants located in such zone. The most deficit zones contain the major consumption centers of Houston and San Antonio. During October 1982, when the market supply/demand relationship was tighter than in May 1983, the ratios of production to receipts for Zones 8 and 9 were 11.7 and 24.8 percent, respectively. The size of these consumption centers, in conjunction with the degree to which they are deficit producing areas, amplifies the need to maintain a pricing structure to assure these areas of a sufficient supply of milk. However, consideration must also be given to the distances that such deficit consumption centers must reach to obtain sufficient supplies of milk.

(u) The Secretary's decision explains that milk moves greater distances on a regular basis to meet the fluid needs of Zones 8 and 9 than with respect to the other southern deficit zones, and the distances and quantities have been increasing substantially. The weighted average distance of milk movements to Houston was about 200 miles, with over half of the milk moved to Houston produced more than 251 miles away. The Secretary's decision states (50 Fed. Reg. at 9667):

Evidence in the record establishes that plants located in the southern deficit Zones 7 through 12 (exclusive of Zone 10) must reach out varying distances to obtain the necessary supplies of milk for fluid

use. As one would expect, plants in Zone 7, which is adjacent to th supplies of milk available in Zones 3 and 5, reach out the leas distance to obtain their supplies. In July 1983, the weighted averag distance of actual milk movements to Zone 7 plants was about 8 miles from Austin, with over 90 percent of the milk movements bein less than 150 miles. For Zone 8, however, the weighted averag distance of milk movements to Houston was almost 200 miles. I terms of milk movements in 50-mile increments, 49 percent of the mil supplies originated between 251 and 300 miles from Houston and mor than half of the milk shipped to Houston fluid milk plants wa produced more than 251 miles from Houston.

Plants at San Antonio in Zone 9 reach out about 161 miles, on weighted average basis, to obtain milk supplies. About 40 percent o the milk received at distributing plants originated in areas betwee 201 and 250 miles from San Antonio. Consequently, plants in Zon 9 do not reach out quite as far for milk as plants in Zone 8, althoug San Antonio is about 33 miles farther south from Dallas than i Houston.

The weighted average distance of milk movements to plants i Zones 11 and 12 is about 118 and 120 miles, respectively. Most o the milk supplies for Zone 11 are obtained from areas within 200 mile of Corpus Christi whereas plants in Zone 12 reach between 201-25 miles from Edinburg for a large proportion of total supplies.

Milk moves greater distances on a regular basis to meet fluid mil needs of plants in Zones 8 and 9 (Houston and San Antonio) tha[n with respect to the other southern deficit zones. Also, it is obviou that substantial quantities of milk must be transported over these lon distances to meet the needs of these major population centers. Also record evidence establishes that both the distances and quantitie moved have increased substantially over a period of years (1961 to 1983) and that the greatest northward expansion of the procurement areas has occur[r]ed with respect to Zones 8 and 9.

The current distance from which Zone 8 plants must obtain milk supplies extends to the heavy milk producing counties in North Texas that are located northeast of Dallas. This area includes Hopkins County, which is the largest milk producing county in the Texas marketing area, as well as three of the other top ten producing counties (Franklin, Upshur and Wood). More than half of the bulk milk shipped to Zone 8 distributing plants originates beyond 251 miles from Houston, and the distance from Houston to Sulphur Springs (the County Seat of Hopkins County) is 253 miles.

Zone 8 plants also obtain substantial volumes of milk from the heavy producing areas of Comanche and Erath Counties that are located southwest of Dallas. Stephenville, the County Seat of Erath County, is 267 miles from Houston.

Plants in Zone 9 also reach to the heavy producing areas of north Texas for substantial supplies of milk, primarily the counties of Comanche and Erath. San Antonio is 205 miles from Stephenville and about 40 percent of the milk shipments to Zone 9 plants originate between 201 and 250 miles from San Antonio. The procurement area for Zone 9 does not extend to any significant degree to the Hopkins County area, which is about 335 miles from San Antonio as measured to Sulphur Springs.

(v) The Secretary's decision explains that the purpose of the current order pricing structure of increasing prices from north to south is to provide assurance that milk will move to the deficit southern consumption centers. The present record shows that a consideration of whether the current location adjustments are providing the necessary price incentives for milk movements is critical only with respect to Zones 8 and 9, which contain major consumption centers, are extremely deficit areas, and must obtain increasing supplies from distant sources. The Secretary's decision states (50 Fed. Reg. at 9667):

> The purpose of the current order pricing structure of increasing prices from north to south is to provide assurance that milk will move to the deficit southern consumption centers. From the previous description of the relationships of the locations of supplies of and demand for fluid milk, it is obvious that such a pricing structure continues to be necessary under current marketing conditions. However, it appears that a consideration of whether the current order location adjustments are continuing to provide the necessary price incentives for milk movements is critical only with respect to Zones 8 and 9. These zones contain major consumption centers, are extremely deficit in terms of local production, and must obtain increasing supplies of milk from distant alternative sources.
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> In this regard, no significant testimony or evidence was presented with respect to the need to adjust prices because of disorderly marketing conditions in zones other than Zones 1, 8, and 9. It appears that the price changes that would result from proponents' proposals were an attempt to maintain an alignment of prices among zones, with some adjustments for individual zone supply/demand relationships, on the basis of a higher transportation rate. For the most part, however, proponents' testimony concerning disorderly marketing conditions resulting from a current inadequacy of location adjustments and the need to increase southern prices centered primarily on the price relationships among Zones 1, 8 and 9, and in particular with the current price level in Zone 8.
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> For the previous reasons, it does not appear necessary at this time to undertake a total restructuring of the price relationships among all

pricing zones in the marketing area. However, consideration of the current prices applicable in Zones 8 and 9 and their relationship to each othe[r] and to the current Zone 1 prices is necessary.

(w) The Secretary's decision explains that it is undisputed that tl current alignment of prices among Zones 1, 8, and 9 at the rate of 1.5¢ p cwt per 10 miles does not reflect the current cost of hauling milk. Opponen arguments that all plants now receive adequate milk is superficial in that disregards inequities among producers and handlers with a potential to disru the movement of milk to Houston. The Secretary's decision states (50 Fe Reg. at 9667-68):

> It is obvious that the current alignment of prices among Zones 1, 8, and 9 at the rate of 1.5 cents per hundredweight per 10 miles does not reflect the current cost of hauling milk. No testimony or evidence presented by any interested party disputed this fact, although opponents contend that there is no credible evidence from which a hauling cost reflecting average, marketwide hauling experience can be derived. Further, they contend that no marketing problems exist even though hauling costs are not covered by current location adjustments since milk is currently moving long distances and all plants receive sufficient supplies of milk. This latter argument is superficial in that it totally disregards the inequities that are occur[r]ing among producers and handlers and the potential for such inequities to disrupt the movement of substantial quantities of milk to expanding consumption centers in South Texas, particularly Houston. Also, there is sufficient evidence in the record from which a conservative estimate of hauling costs can be incorporated in a location adjustment that will provide a greater measure of equity among market participants and a greater incentive for southern shipments of milk.
>
> Additional transportation costs that are not reflected in order location adjustments must be either paid for by the handler receiving the milk or subsidized through a net reduction in returns to producers who supply such plants. Either option can result in inequities among market participants if there is a disproportionate application of the additional costs. The problem is, of course, a matter of degree, which depends on how much milk must be moved, the distance involved, and the transportation rate.

(x) The Secretary's decision explains that Associated Milk Produce Inc. (AMPI), represents about two-thirds of the producers who supply t Texas market. For most of 1981 through 1982, AMPI's over-order pric resulted in Houston actual Class I prices about 72¢ per cwt higher th Dallas, representing differences in the location value of milk based on curre transportation costs. Since May of 1983, however, AMPI's over-order pri structure between Dallas and Houston reflects only the 36¢ price differen applying under the order. Accordingly, since May of 1983, AMPI produce have been subsidizing the transportation cost incurred in supplying Housto handlers. Noncooperative members do not ship any milk from the hea

northeast production area to Houston. Consequently, AMPI members bear the burden of shipping milk to Houston, and as a result there are inequities among producers in the heavy northeast milk producing counties. Although there is no detailed information as to the precise extent to which AMPI pay prices are less than prices to other producers, AMPI pay prices have been slightly below the blend price while pay prices to nonmember producers supplying Zone 1 (Dallas) plants have exceeded the blend price. But even if additional information were in the record as to AMPI pay prices, it would not be known to what extent they were affected by AMPI's total operations, which extend well beyond Texas. However, since AMPI is not recovering the additional transportation costs in shipping to southern deficit areas, returns to AMPI logically must be reduced relative to other producers not incurring the additional transportation costs. The Secretary's decision states (50 Fed. Reg. at 9668):

> AMPI is the largest supplier of milk to handlers located throughout the marketing area and represents about two-thirds of the producers who supply the market. AMPI also markets the milk of Mid-Am producers through arrangements between the two cooperatives. AMPI establishes prices to buying handlers in excess of Federal order minimum Class I prices. These over-order prices cover a variety of services provided to handlers, including the cost of hauling milk from where it is produced to where it is needed for fluid use.
>
> Record evidence established that the over-order charges varied over time and were also subject to various competitive credits from such prices and that hauling surcharges of varying amounts were also established. For most of the 1981 through 1982 period, the end result of the announced prices was that Class I prices in Houston were about 72 cents per hundredweight higher than in Dallas. This would indicate that such over-order prices represented differences in the location value of milk on the basis of a more current transportation rate. Since May of 1983, however, the over-order price structure was modified so that the difference in prices between Dallas and Houston reflected only the 36-cent price difference that applies under the order.
>
> Since the order location adjustment does not cover the cost of hauling milk to Houston, AMPI producers must be subsidizing the additional transportation cost incurred in supplying Houston handlers under the pricing structure established in May 1983. The subsidization of transportation costs results in a lower blend price to AMPI producers relative to those producers who do not incur the additional transportation costs that result from supplying distantly located deficit southern zones of the marketing area. Substantial quantities of milk are shipped to Zones 8 and 9 from the heavy milk producing regions located northeast and southwest of Dallas. Record evidence established that there are a large number of nonmember producers located in the heavy northeast production area but that there is no

nonmember milk shipped from there to Houston. Consequently, i AMPI producers who bear the burden of shipping milk to Houst and as a result there are inequities among producers in the he northeast milk producing [counties].

There is no detailed information in the record that establish precisely the extent to which AMPI pay prices are less than prices other producers who supply the Texas market. However, testimo does indicate that AMPI pay prices have been slightly below the ord blend price while pay prices to nonmember producers who sup Zone 1 plants have been in excess of the order blend price. Howev even if additional information on AMPI pay prices were included the record, it would not be known to what extent the Texas mark AMPI pay prices are affected by the total marketing operations AMPI, which extends well beyond the Texas market and includes of the Federal order markets covered by AMPI's Southern Regio The AMPI Southern Region includes all of the area from Texas Kansas and New Mexico to Alabama. However, this information is n necessary. Since substantial quantities of AMPI milk are shipped deficit southern areas and additional transportation costs are n recovered under the current pricing structure, returns to AM logically must be reduced relative to other producers who do not inc the additional transportation costs that are not reflected in the orde

(y) The Secretary's decision explains that for all of 1981 a nd th 2 months of 1982, AMPI's competitive credit (i.e., discount) to Ho handlers was 26¢ per cwt less than the discount to Dallas handlers (res in higher prices to Houston handlers than to Dallas handlers). During of the remaining months in 1982, the differences in the credits was 16¢ cwt. However, during this entire period, AMPI applied the same compe credit (discount) to Schepps' Dallas plant on that portion of Schepps' sal Houston (about half of Schepps' total sales). As a result, AMPI's pri Schepps at Dallas approached the price paid to AMPI by the Hou handlers, even though Schepps was not getting the transportation service b given to the Houston handlers. Therefore, "costs among handlers resulted from the application of over-order prices to recover hauling costs reflected under the order were not uniform or related to specific servic The Secretary's decision states (50 Fed. Reg. at 9668):

As previously stated, prior to May 1983, the difference in market Class I prices at Dallas and Houston reflects the higher cost of the service involved in supplying Houston area plants. The net differences in over-order Class I prices are computed by subtracting the order Class I price from the AMPI announced Class I price, and then adjusted by the competitive credit applicable to the Dallas and Houston areas. For all of 1981 and the first two months of 1982, the Houston area competitive credit (or discount) was 26 cents per hundredweight less than the Dallas area credit. During most of the remaining months in 1982, the difference in the credits was 16 cents per hundredweight. Application of the lower credit for Houston area

handlers resulted in a higher Houston Class I price relative to Dallas. However, during this entire period, the Houston area credit was applied by AMPI to receipts at Schepps' Dallas plant on that portion of Schepps' sales in Houston (about one-half of Schepps' total sales of packaged fluid milk products). This meant that Schepps was paying a higher price for milk sold in Houston than for milk sold in Dallas, and that such higher price approached the price paid by Houston handlers even though the milk was being received at Dallas from nearby production areas. To the extent that the AMPI price differences between Dallas and Houston reflect the additional cost of hauling milk, the application of the Houston area credit to receipts at Dallas represents a charge for a service that Schepps did not receive, namely, the transportation of milk to Houston. Consequently, costs among handlers that resulted from the application of over-order prices to recover hauling costs not reflected under the order were not uniform or related to specific services.

(z) The Secretary's decision explains that from 1981 through April 1983, AMPI's prices included a hauling surcharge to Houston of 10¢ to 20¢ per cwt higher than to Dallas, but in May 1983, the difference was eliminated because AMPI was losing fluid markets as a result of the overall supply/demand balance. The Secretary's decision states (50 Fed. Reg. at 9668):

> For 1981 through April 1983, AMPI's announced prices were adjusted to include a hauling surcharge for the delivery of milk to certain areas. From January 1981 through February 1982, the hauling surcharge to Houston was 10 cents per hundredweight higher than for delivery to Dallas. In March 1982, the difference in the hauling surcharge was increased to 20 cents and beginning in May 1983, the difference in the hauling surcharge between Dallas and Houston was eliminated. The most recent changes in the over-order price structure were implemented in view of the impact of the overall supply/demand balance in the market that was resulting in a loss of fluid markets by AMPI.

(aa) The Secretary's decision concludes that there has been a "lack of uniformity in costs to handlers and returns to producers that is not representative of orderly marketing conditions," which "inequities" are "a result of the failure of the order pricing structure to reflect a sufficient amount of the current cost of hauling milk." The deficiency in the location adjustment is amplified because of the substantial distances involved and the amounts of milk that must be moved to the major southern consumption centers. Consequently, a greater location adjustment needs to be considered to attract milk to the deficit Zones 8 and 9. The Secretary's decision states (50 Fed. Reg. at 9668-69):

The previous and current over-order price structure has been affected by competitive conditions that are influenced by market supply/demand relationships. There is every indication that at times there has been a lack of uniformity in costs to handlers and returns to producers that is not representative of orderly marketing conditions. The inequities among handlers and producers, to a large degree, are a result of the failure of the order pricing structure to reflect a sufficient amount of the current cost of hauling milk. The magnitude of the deficiency is amplified because of the substantial distances involved and the amounts of milk that must be moved to the major consumption centers in the South. Consequently, a greater transportation allowance needs to be considered under the order to attract milk to the deficit Zones 8 and 9 from the nearest alternative sources of supply that are available to meet fluid milk needs.

(bb) The Secretary's decision summarizes the exceptions (to the proposed decision) filed by Zone 8 handlers, as follows (50 Fed. Reg. at 9669):

Exceptions filed on behalf of handlers who operate distributing plants in Zone 8 (Borden, Inc.; Carnation Co.; Safeway Stores, Inc.; and The Southland Corporation) contend that the previous findings concerning the existence of inequities among producers and handlers are not supported by substantial evidence. Exceptors contend that there is no evidence to establish that a difference in pay prices to producers is a result of AMPI subsidizing hauling costs to Houston and, further, that the Secretary has no authority to bring about uniformity in actual pay prices to producers. They contend that differences in pay prices do not mean that there are disorderly marketing conditions and that the Secretary's power to address disorderly marketing conditions is limited to those conditions which cause unreasonable changes in supplies and prices. They conclude that there are no disorderly marketing conditions since Houston handlers are obtaining an adequate supply of milk and that there is no indication that there will be any future problems in obtaining milk supplies. Exceptors further state that at the time of the hearing, they were paying 87 cents per hundredweight in excess of the order Class I price, 19 cents of which is a hauling surcharge. Consequently, they contend, that with the 19-cent hauling surcharge and the 36-cent location adjustment for Zone 8, they were paying for the cost of hauling milk to Houston. Furthermore, they contend that since no AMPI witness was available to explain the purpose for which premium dollars were spent, there is no assurance that the additional 68- cent premium above the hauling surcharge was not available to cover transportation costs. With respect to the issue of whether costs to handlers are uniform, exceptors contend that the recommended decision attempts to establish uniform costs among handlers in all areas in which they seek to compete for fluid milk sales. Exceptors state that the Act requires that handlers' costs be the same as all other handlers in the same location and that there was no contention that

Schepps paid any more or less for milk than competitor plants located in Dallas.

(cc) The Secretary's decision explains that (i) Houston has experienced a significant increase in population, (ii) an increasing proportion of Houston's milk must be imported from distant areas, (iii) the "Zone 8 location adjustment no longer represents a sufficient degree of the added service or cost involved in supplying milk to plants in such area," (iv) although Zone 8 plants have obtained adequate milk, "inequities exist among producers and handlers" that are "representative of disorderly and unstable marketing conditions that threaten the continued availability of milk supplies for Zone 8. . . ." The Secretary concluded that it is appropriate "to review and rectify those marketing conditions (such as nonuniform returns to producers and costs to handlers) that result from a failure of the order to reflect an appropriate location value of milk." The Secretary's decision states (50 Fed. Reg. at 9669):

> Exceptors' views overlook basic market facts and evidence contained in the record and logical conclusions that are set forth in this decision, which establish the need to increase the location adjustment in Zone 8. The Houston area has experienced a significant increase in population and an increasing proportion of milk supplies from distant areas must be obtained to meet fluid milk needs. At the same time, transportation costs have increased to the point that the current Zone 8 location adjustment no longer represents a sufficient degree of the added service or cost involved in supplying milk to plants in such area. Although the record indicates that Zone 8 plants have obtained sufficient supplies of milk it also establishes that, because of higher transportation costs and various changes in the over-order pricing structure, inequities exist both among producers and handlers. These inequities are representative of disorderly and unstable marketing conditions that threaten the continued availability of milk supplies for Zone 8 plants and, therefore, must be addressed by the Secretary under the purposes and requirements of the Act. Certainly it is appropriate for the Secretary, under the authority of the Act, to review and rectify those marketing conditions (such as nonuniform returns to producers and costs to handlers) that result from a failure of the order to reflect an appropriate location value of milk.

(dd) The Secretary's decision explains that although the exceptors contend they paid the full hauling cost, AMPI's 19¢ hauling surcharge applied to all handlers (including Dallas and Houston handlers), and that the net difference between Dallas and Houston handlers was only 36¢, which does not cover the cost of hauling milk to Houston. Accordingly, AMPI producers must be subsidizing the cost of hauling milk to Zone 8 plants, and therefore AMPI producers' returns are lower than those of (nonmember) producers in the heavy northeast production area who do not ship milk to Houston. The Secretary's decision states (50 Fed. Reg. at 9669):

The record establishes the existence of various over-order prices as well as changes in the over-order pricing structure over time. Although exceptors contend that they paid the full hauling cost, and thus there could be no producer subsidy, the record establishes that the same premium, including the 19-cent hauling surcharge, applied to all handlers. Therefore, the net difference in the charges between Dallas-area and Houston-area plants was 36 cents per hundredweight. Also, AMPI testified that virtually all of the over-order charge was absorbed in the cost of moving milk from where it is produced to where it is needed. Since 36 cents does not cover the cost, logically, AMPI producers must be subsidizing the cost of hauling milk to Zone 8 plants and their returns are therefore lower than the returns to other producers located in the heavy northeast production area who do not incur the cost of shipping milk to Houston.

(ee) The Secretary's decision explains that since AMPI's high Houston price was applied to Schepps at Dallas, prices were not unifor among handlers in Dallas. The Secretary's decision states (50 Fed. Reg. 9669):

> Prior to the revision of the pricing structure in May 1983, a greater proportion of the hauling cost is evident in the difference in prices between Zones 1 and 8. However, as previously stated, the higher Houston price was applied to Schepps in Zone 1. Consequently, contrary to exceptors' contentions, prices were not uniform among handlers as at least two different prices applied at the same location. Also, it is obvious that Schepps paid a higher price than competitors in Dallas.

(ff) The Secretary's decision explains that the increased locatio adjustment "is not intended in any way to equate costs among all handlers o the basis of the areas in which they seek to compete," but, rather, is based o "the need to reflect a greater proportion of the current hauling costs in th current order location adjustments" to (i) assure sufficient supplies of milk t Houston plants and (ii) "lessen the inequities . . . among handlers in Dalla and producers in northeast Texas because of costs associated with supplyin Houston handlers." The Secretary's decision states (50 Fed. Reg. at 9669):

> Contrary to exceptors' contentions, the change in the location adjustment provided herein is not intended in any way to equate costs among all handlers on the basis of the areas in which they seek to compete. The price change is based on the need to reflect a greater proportion of the current hauling costs in the current order location adjustments to assure that sufficient supplies of milk will be made available to Houston-area plants and to lessen the inequities that have and are continuing to occur among handlers in Dallas and producers in northeast Texas because of costs associated with supplying Houston handlers. The location adjustment increase applies uniformly to all handlers at the same locations.

(gg) The Secretary's decision explains that 3¢ per cwt per 10 miles is a conservative transportation rate that should be used in considering location adjustments for Zones 8 and 9, stating that while it "falls short of covering actual costs," it covers "a significantly greater proportion of current hauling costs than are currently reflected under the order." The Secretary's decision states (50 Fed. Reg. at 9669-70):

> There is no broad-based statistical evidence in the record from which any precise transportation rate can be calculated that would represent a marketwide average variable cost of hauling milk. However, evidence presented through a number of witness[es] indicated various costs or charges that are applicable in the Texas and surrounding marketing areas for hauling bulk milk. The hauling charges ranged from $1.60 to $1.80 per loaded mile. The lower charge, which converts to a rate of 3.2 to 3.5 cents per hundredweight per 10 miles, depending on the weight of the load, is AMPI's freight rate quotation for hauling services provided to buyers and such charge was also attributed to an independent hauler. In addition, Mid-Am indicated that it pays $1.64 per loaded mile for transporting milk on regular long distance hauls. Although this evidence does not establish a precise average or standard market price for milk transportation services, it does show that the cost of hauling bulk raw milk is significantly greater than 1.5 cents per hundredweight per 10 miles.
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> In view of the lack of ce[r]tainty over the extent to which hauling costs have increased, a conservative estimate of hauling costs should be used to consider the location adjustment change that is necessary at this time. If location adjustments were based on a rate in excess of costs, significant economic incentives could be created to move milk to obtain hauling profits. A conservative hauling rate, which falls short of covering actual costs, would maintain incentives to implement hauling efficiencies.
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> In view of the above, the hauling rate should be slightly below the lowest rate identified on the record as being representative of the cost of hauling milk in the Texas marketing area. It is concluded that a rate of 3 cents per hundredweight per 10 miles should be used to consider the location adjustments that are appropriate for Zone[s] 8 and 9 of the marketing area. Such rate should encourage the continued implementation of hauling efficiencies and at the same time cover a significantly greater proportion of current hauling costs than are currently reflected under the order.
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> Exceptions filed on behalf of Schepps and Houston handlers contend that the 3-cent rate does not reflect current hauling costs. Schepps contends that such rate is insufficient to cover current costs in that hauling charges identified in the record were in excess of 3.5

cents per hundredweight per 10 miles. Houston handlers, although acknowledging that 1.5 cents does not cover current costs, contend that there is no evidence to support the conclusion that the 3-cent rate represents a conservative estimate of current costs.

The record identifies a number of current charges that prevail in the marketing area for hauling bulk milk as previously discussed. As previously stated, the record does not establish a precise, average, marketwide rate of transportation. It does, however, contain sufficient information to establish a conservative rate. The arguments presented in exceptions do not provide a basis for altering the conclusion that a lower rate than those in evidence would provide incentive for transportation efficiencies while also covering a significantly greater proportion of current costs than are now reflected under the order.

(hh) The Secretary's decision explains that using 3¢ per cwt per miles to compute location adjustments from Dallas (the present basing poi would result in a location adjustment of 72¢ in Zone 8 and 81¢ in Zone However, "a refinement of the alignment of prices is necessary" in view changed production patterns. Zone 9 now receives substantial quantities milk from the heavy producing areas located southwest of Dallas (Stephenv area), and considering the additional mileage to San Antonio from t production area (compared to shipments from the same area to Dallas/ Worth), the present 42¢ location adjustment at Zone 9 is appropriate, e using the increased 3¢ per cwt per 10 miles rate. The Secretary's decis states (50 Fed. Reg. at 9670):

> As previously stated, the current relationship of prices among Zones 1, 8 and 9 is based on the distance between Dallas and Houston and Dallas and San Antonio. Application of the 1.5-cent rate to the current distance of 237 miles between Dallas and Houston results in a 36-cent higher price at Houston. Also, on the same basis, the 270 miles between Dallas and San Antonio results in approximately a 42-cent higher price at San Antonio relative to Dallas. The merger decision concluded that the resulting price relationship between Houston and San Antonio was appropriate because San Antonio was further from the North Texas supply area than Houston.
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> Continuing to align prices from Dallas but at the higher transportation rate of 3 cents per hundredweight would result in location adjustments of 72 cents in Zone 8 and 81 cents in Zone 9. However, in addition to using a higher transportation rate, a refinement of the alignment of prices is necessary to better reflect the different distances that milk must move from common supply areas to alternative outlets, and because of an increase in production in certain areas that are advantageously located to supply the fluid milk needs in Zone 9.
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> Plants in Zone 9 receive substantial quantities of milk from the heavy producing Comanche-Erath County area that is located

southwest of the Dallas/Ft. Worth area. This area is 205 miles from San Antonio (as measured to Stephenville, the County Seat of Erath County). This two-county area also furnishes substantial supplies of milk to Zone 8 handlers but is 267 miles from Houston. On this basis, the location adjustment should be lower for Zone 9 than for Zone 8, which is contrary to the current alignment of prices under the order. Producers in the Stephenville area provide a lesser service by supplying Zone 9 handlers than they provide in supplying Zone 8 handlers since they are 62 miles closer to San Antonio than Houston.

Since Zone 9 handlers have been able to secure a supply of milk from increased production that has occurred in the Comanche-Erath County area, the appropriate location adjustment for Zone 9 should be based on this supply area. However, this two-county area also supplies the major Dallas/Ft. Worth consumption area in Zone 1. The Stephenville area is 97 and 67 miles from Dallas and Ft. Worth, respectively. (Official notice is taken of the Official State Mileage Guide, Texas Statistical Research Service, Austin, Texas.) Producers supplying the Dallas/ Ft. Worth area receive the Zone 1 price and must pay the farm-to-plant hauling cost. Consequently, in order to be indifferent to supplying the San Antonio area, only the additional mileage in moving milk to San Antonio must be considered in establishing the Zone 9 location adjustment. Based on the Dallas/San Antonio alternative, there is a difference of 108 miles, which equates to a location adjustment of 33 cents with the 3-cent hauling rate. Based on the Ft. Worth-San Antonio comparison, the location adjustment would be 42 cents, (205[-]67 = 138 or 14 ten-mile increments x 3¢) which is the current location adjustment for Zone 9. Consequently, even though hauling costs have increased, no price increase is necessary for Zone 9 because of the increase of production in an area that is advantageously located to supply the fluid milk needs of handlers operating plants in Zone 9.

(ii) The Secretary's decision explains that using the same Stephenville supply area in considering Zone 8's location adjustment as was used for Zone 9 (in the preceding paragraph), and using the same procedure (making producers indifferent as to whether they supply Dallas or Houston), would result in a 63¢ location adjustment for Zone 8. The Secretary's decision states (50 Fed. Reg. at 9670):

The same procedure as previously set forth for Zone 9 should also be used to consider the appropriate location adjustment for Zone 8. To the extent that Zone 8 needs to rely on the Stephenville area for a source of supply, the location adjustment for Zone 8 would need to result in a price that would make Stephenville area producers indifferent to supplying San Antonio or Houston. As such, the price at Houston would have to cover the additional distance that milk must be hauled to supply Houston rather than San Antonio. In this case,

the additional distance is 62 miles, which translates to a 21-cent higher price at Houston than at San Antonio. In other words, based on price adjustments from Dallas, the Zone 8 location adjustment would be 63 cents.

(jj) The Secretary's decision explains that even though Houston receives a greater proportion of its supplies from the Stephenville area than from the closer Hopkins County (Sulphur Springs) area, Houston receives a substantial proportion of its milk from the Sulphur Springs area, and location adjustments should provide incentives to attract milk from the nearest alternative supply areas that are available to supply fluid milk needs. Since Houston is 174 miles farther from Sulphur Springs than is Dallas, the location adjustment for Zone 8 (Houston) should be eighteen 10- mile zones at 3¢ per 10 miles, or 54¢--an increase of 18¢ over the current Zone 8 location adjustment. The Secretary's decision states (50 Fed. Reg. at 9670):

> However, in establishing location adjustments, incentives should be created to attract milk from the nearest alternative supply areas that are available to supply fluid milk needs. In this case, Houston is nearer to the heavy supply areas that are located northeast of Dallas (the Hopkins County area) than to the Stephenville area. Houston is 253 miles from Sulphur Springs (the County Seat of Hopkins County), about one ten-mile zone closer than Houston is from Stephenville. Although a greater proportion of the supplies for Houston plants originates in the Stephenville area than in the Sulphur Springs area, the Zone 8 location adjustment should be based on the price incentive necessary to attract milk supplies from the nearer Sulphur Springs area.
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> As was the case with the Stephenville area, the Sulphur Springs area supplies a substantial proportion of the fluid milk needs of the large Dallas/Ft. Worth consumption center. In order to establish an incentive for milk to move to Houston, the Zone 8 location adjustment must reflect the additional miles involved in hauling milk to Houston rather than Dallas. In this case, Houston is 174 miles farther from Sulphur Springs than is Dallas. Thus, the 18 ten-mile zones at 3 cents per ten miles require a location adjustment of 54 cents in Zone 8, an increase of 18 cents over the current order location adjustment.

(kk) The Secretary's decision concludes that the modification to the Zone 8 location adjustment, which is the only required change, will (i) cover a greater proportion of transportation costs to Zone 8, (ii) establish a greater degree of equity among producers and handlers, (iii) provide greater assurance that milk will be available in Houston, the largest consumption center in the marketing area, and (iv) promote stable and orderly marketing conditions, while refining the price alignment among Zones 1, 8 and 9 by recognizing the nearest alternative sources of supply. The Secretary's decision states (50 Fed. Reg. at 9670-71):

The modification to the Zone 8 location adjustment is the only price change that is necessary at this time. The higher price will cover a greater proportion of current transportation costs, establish a greater degree of equity among producers and handlers, provide a greater assurance that supplies of milk will be made available to supply the fluid milk needs of the largest consumption center in the marketing area and promote stable and orderly marketing conditions as required by the Act. Also, the increased location adjustment represents a refinement of the current price alignment among Zones 1, 8 and 9 by recognizing the nearest alternative different sources of supply for Zones 8 and 9 and the proximity of such supply areas to Zone 1 consumption centers.

(ll) The Secretary's decision summarizes objections to his procedure of recognizing actual and potential supply areas in considering location adjustments for Zones 8 and 9, as follows (50 Fed. Reg. at 9671):

Exceptions filed on behalf of Schepps and Houston handlers contend that the recognition of actual and potential supply areas in considering the price adjustments necessary for Zones 8 and 9 represents a significant departure from the historical practice of basing location adjustments on mileage from Dallas. Proponent contends that the use of incremental mileage (for example, the difference between the mileage from Sulphur Springs to Dallas and the mileage from Sulphur Springs to Houston) results in an understatement of the price adjustment that is necessary to cover the cost of hauling milk to Houston. Opponents contend that the procedure: (1) [w]as not noticed for hearing; (2) was not advocated by any witness; (3) is not utilized in establishing location adjustments under any other Federal milk order; (4) ignores the realities of the way milk moves; (5) discriminates against Houston handlers since Zone 8 is the only pricing zone that has a location adjustment that recognizes distance from its source of supply; and (6) if used for other pricing zones, would destroy any concept of price alignment among competing dealers and cause extraordinary supply dislocations throughout the market.

(mm) The Secretary's decision explains that failure to recognize changes in the location of supplies of milk for San Antonio and Houston could result in location adjustments for Zones 8 and 9 higher than necessary, and that the Secretary's methodology is "consistent with the application and purposes of location adjustments throughout the Federal milk order system; namely, to reflect the cost of transporting milk from production areas to consuming centers." The Secretary's decision states (50 Fed. Reg. at 9671):

This decision sets forth the alternative pricing proposals contained in the Notice of Hearing to revise the pricing structure under the order, including price increases of 27 to 36 cents for Zone 8 and price increases of 15 to 23 cents for Zone 9. Within the context of these

proposals, and in conjunction with the record evidence concerning the current and potential supply areas for plants in Zones 8 and 9, it is appropriate to recognize the realities of the way milk moves in considering the price adjustments that are necessary. Although no witness advocated the specific methodology used to consider the price adjustment provided herein, several witnesses recognized the obvious importance of actual and potential supply areas in determining the price adjustments that might be necessary in any area, as well as the difference in the cost of hauling milk from a common supply area to alternative outlets. In addition, although location adjustments have primarily been based on distances from Dallas in the past, recognition of the supply area was considered in the past in establishing the current price adjustment for Zone 9 as previously set forth in this decision. Evidence in this record establishes that the Zone 9 location adjustment should not be based on the mileage from Dallas because of the increase in milk supplies located nearer to San Antonio than the supplies of milk located northeast of Dallas. A failure to recognize this basic change, and continuing to base the Zone 9 location adjustment on the total mileage between Dallas and San Antonio, would result in establishing a Zone 9 price that is higher than necessary to attract a supply of milk from the nearer production area. Likewise, basing the Zone 8 location adjustment on the distance between Dallas and Houston would result in a need to establish a price that would be in excess of the price necessary to attract milk from supply areas that must be relied on to provide a sufficient supply of milk for fluid use. Consequently, the rationale set forth in this decision for the price increase in Zone 8, as well as the denial of any price increase in Zone 9, recognizes the realities of way bulk milk moves in the market and is sound in its economic reasoning. Also, the decision is consistent with the application and purposes of location adjustments throughout the Federal milk order system; namely, to reflect the cost of transporting milk from production areas to consuming centers.

(nn) The Secretary's decision explains that the argument of Housto ındlers that recognition of actual supply areas provides opportunities fc ɔperative associations to manipulate sources of supply is unfounded becaus Secretary also considers potential alternative sources of supply. Th retary's decision states (50 Fed. Reg. at 9671):

Houston handlers also contend that recognition of the actual supply area in establishing zone prices provides the opportunity for cooperative associations to manipulate order prices by altering the source of supply for particular consumption centers. In this regard, potential alternative sources of supply that are located nearer to consumption centers are also considered in establishing location adjustments. This decision establishes the location adjustment for Zone 8 on the basis of the nearer Sulphur Springs supply area rather than on the supply area southwest of Dallas that currently furnishes a greater proportion of the milk supply for Zone 8 handlers.

(oo) The Secretary's decision explains that the argument is moot that the same approach would result in misalignment of prices if it were followed in other areas. The decision also explains that a "price increase for Zone 8 is necessary to establish orderly marketing conditions by reflecting a greater proportion of the cost of hauling milk to Zone 8 plants." A refinement in the alignment of prices among Zones 1, 8 and 9 is necessary to reflect changing production patterns. Furthermore, the Zone 8 price increase was reviewed for its effect in other areas, and it was determined that it would not result in a misalignment of prices among plants in the various pricing zones. (Examples are given as to Zones 4 and 5.) The Secretary's decision states (50 Fed. Reg. at 9671-72):

> Opponents' contention that a misalignment of prices would result if the approach used to consider the appropriate location adjustments for Zones 8 and 9 were also used for all other zones is a moot issue since no other price adjustments are provided. A price increase for Zone 8 is necessary to establish orderly marketing conditions by reflecting a greater proportion of the cost of hauling milk to Zone 8 plants. Also, a refinement of the alignment of prices among Zones 1, 8 and 9 is necessary because of the increase in milk production in counties southwest of Dallas that is available to plants in Zones 1, 8 and 9. Furthermore, the Zone 8 price increase is reviewed in light of the current prices applicable in other zones to determine if a significant misalignment of prices would result that would disrupt or hinder the ability of plants in the various zones to attract sufficient supplies of milk. As hereinafter set forth, it is concluded that the Zone 8 price increase would not result in a misalignment of prices among plants in the various pricing zones.
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> The price increase in Zone 8 that improves the price alignment among Zones 1, 8 and 9, does not significantly disrupt the price alignment among Zone 8 and other zones of the marketing area. Distributing plants located at Lufkin and Bryan (which are in Zones 4 and 5, respectively) are 119 and 95 miles from Houston. Under the current order price structure, the Houston price is 16 cents higher than the price at Bryan and 18 cents higher than the price at Lufkin. With the price increase at Houston, the Zone 8 price will be 34 cents higher than the price at B[r]yan and 36 cents higher than the price at Lufkin.
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> Based on the distance from Bryan to Houston, and the 3-cent hauling rate, a precise alignment of prices between Bryan and Houston would be accomplished with a 50-cent location adjustment at Houston, rather than the 54-cent adjustment adopted herein. The additional 4 cents that is provided herein should help attract milk from the Zone 5 area, yet it would not be so great as to jeopardize the maintenance of a supply of milk for the one distributing plant in Zone 5. As previously stated, there is a substantial amount of production in Zone 5 that is in excess of the bulk fluid milk receipts at the distributing

plant in such Zone. Also, fluid milk needs are relatively small as the total population in Zone 5 represents only about 1.7 percent of total marketing area population.

Based on the distance between Lufkin and Houston and the 3-cent hauling rate, the 36-cent higher price at Houston relative to Lufkin represents a precise alignment of prices. Beaumont, which is located in Zone 8 northeast of Houston, is 108 miles from Lufkin. Consequently, the price at Beaumont will be only 3 cents per hundredweight higher than the price in Lufkin plus the implied transportation cost of 33 cents between Lufkin and Beaumont.

(pp) The Secretary's decision explains that the higher Zone 8 price will not jeopardize the supply for Zones 9, 11 and 12, as follows (50 Fed. Reg at 9672):

> The price increase in Zone 8, although designed to provide the incentive for milk supplies to be procured from the nearest heavy producing area around Sulphur Springs, results in a total expansion of the theoretical procurement area for Zone 8 plants. The higher price shifts the procurement area to the west and northwest towards the Zone 9 procurement area. It has already been noted that both zones procure milk supplies from the Comanche-Erath County area even though the current Zone 8 price is not currently competitive in such area relative to the Zone 9 price. Even though the proposed Zone 8 price moves the potential supply area for Houston towards the San Antonio supply area, the price would not be so high as to jeopardize the supply of milk for Zone 9 plants that are advantageously located with respect to the heavy producing Comanche-Erath County area.
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> The Zone 8 price increase also shifts its theoretical procurement area south towards Corpus Christi by about 60 miles. Such shift does not extend into the current primary procurement areas of plants located in Zones 11 and 12 to any significant degree. Most of the milk supplies for plants in these zones are procured from areas in competition with Zone 9 plants and the price relationships in Zones 9, 11 and 12 are not altered in this decision.

(qq) The Secretary's decision answers the objection that Zone 8 handlers will be disadvantaged in competing with Zone 9 and Zone 4 handlers by explaining that (i) the "purpose of location adjustments is to provide incentives for the delivery of supplies of bulk milk to various plant locations," (ii) "the cost of hauling milk to Houston is in excess of the [location adjustment]," (iii) "inequities among producers and handlers have resulted because of an inability of the over-order pricing structure to effectively recover the costs or to apportion the costs equally among handlers," and (iv) handlers and producers in northern areas have subsidized the shipping of milk to Houston. <u>The Secretary's decision states that the "major thrust of the pricing proposal and the intent of the decision is to establish a more equitable pricing</u>

structure by assessing more of the costs associated with moving the milk into Zone 8 upon those plants that receive the milk and occasion the costs." The Secretary's decision states (50 Fed. Reg. at 9672):

> Additional arguments in exceptions filed on behalf of Houston handlers contend that the Zone 8 price increase discriminates against such handlers who now will have a disadvantage in competing with handlers in Zone 9 to the west and handlers in Zone 4 to the east. Exceptors contend that if hauling costs have increased, they have increased for everyone and that there is no basis for establishing a location adjustment reflecting a 3-cent per hundredweight hauling rate for Zone 8 plants while location adjustments for other zones reflect a 1.5-cent hauling rate.
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> As previously stated, the purpose of location adjustments is to provide incentives for the delivery of supplies of bulk milk to various plant locations. The evidence in the record establishes that the cost of hauling milk to Houston is in excess of the transportation allowance provided under the order and that inequities among producers and handlers have resulted because of an inability of the over-order pricing structure to effectively recover the costs or to apportion the costs equitably among handlers. As a result, handlers and producer[s] in northern areas, at various times and to various degrees, have subsidized the costs incurred in shipping milk to the Houston area. Consequently, the major thrust of the pricing proposal and the intent of the decision is to establish a more equitable pricing structure by assessing more of the costs associated with moving the milk into Zone 8 upon those plants that receive the milk and occasion the costs.

(rr) The Secretary's decision denies the proposal to combine Zones 2 and 4 into one zone. An increase in the Zone 2 price would negate the primary objective of attracting a supply of milk from the northeast supply area to Zone 8. The Secretary's decision states (50 Fed. Reg. at 9672):

> The proposed modification to combine Zones 2 and 4 into one pricing zone that was supported by the handler who operates a plant at Lufkin should not be adopted. Proponent's claim of being at a competitive disadvantage in selling fluid milk products in competition with Zone 2 handlers is not a proper basis for the proposed action. The current 12-cent difference in the Class I price between the two zones must be maintained to facilitate the southward movement of milk. If the price in Zone 4 were reduced to the Zone 2 price, the maintenance of the milk supply for the Lufkin plant would be jeopardized because of the incentive for producers to ship milk further south to the deficit Zone 8. The need to maintain the current Zone 4 price at its current level is even greater because of the price increase adopted herein for Zone 8. On the other hand, if the Zone 2 price were increased to the Zone 4 level, such price would be too high

relative to the price at Dallas and the proximity of Zone 2 to the heavy northeast Texas production area. As such, an increase in the Zone 2 price would negate the primary objective of the price increase in Zone 8 to attract a supply of milk from the northeast Texas supply area.

The handler who operates the plant in Zone 4 requested that the previous conclusions denying the proposal to combine Zones 2 and 4 into one pricing zone be reconsidered. However, no arguments were presented that would indicate a need to alter the findings and conclusions concerning the proposal.

(ss) The Secretary's decision explains that the Department was n. required to publish a regulatory flexibility analysis prior to holding th hearing, as follows (50 Fed. Reg. at 9672):

> Opponents to the pricing proposals contend that the proposals cannot be considered because the Department failed to publish an initial regulatory flexibility analysis prior to holding the hearing, which they contend is required by the Regulatory Flexibility Act.
>
> Section 608c(4) of the Agricultural Marketing Agreement Act of 1937, as amended, provides that the Secretary must base a marketing order on evidence contained in the record of a public hearing. Therefore, proceedings to amend Federal milk orders are governed by sections 556 and 557 of Title 5 of the United States Code. Under these "formal" rulemaking procedures, decisions can be based only on evidence contained in the record of a public hearing. As a result, it would not be appropriate for the Secretary to publish an analysis containing conclusions that describe the impact of the proposals on small businesses prior to holding a public hearing to gather the evidence on which the decision must be based. Therefore, publication of an analysis or a certification that the proposed amendments, if promulgated, would not have a significant economic impact on a substantial number of small entities is not made until the recommended or final decision stage of a proceeding that provides for amendatory action.
>
> The notice scheduling the hearing specifically invited interested parties to present evidence on the probable impact on small businesses of the hearing proposals or modifications of the proposals for the purpose of tailoring their applicability to small businesses. In opposing any of the pricing changes, opponents testified to the probable impacts of various combinations of proposed pricing changes in terms of changes in the value of producer milk and cost to handlers.

(tt) The Secretary's decision explains that the 18¢ price increase in Zone 8 represents only a 1.2% increase in the Class I price at Houston, that it "is intended to cover only a part of the current cost of shipping milk long distances on a regular basis to meet increased fluid milk needs of the largest population center in the marketing area," and that it will have only a minimum

impact on returns to producers. The Secretary's decision states (50 Fed. Reg. at 9672):

> This testimony on the probable impact of the proposed pricing changes was con[s]idered in this decision which contains a certification that the proposed amendments, which include the minimum price change for Zone 8 will not have a significant economic impact on a substantial number of small entities. The 18-cent price increase in Zone 8 will not be significant, as it represents only a 1.2 percent increase from the minimum order Class I price at Houston in effect at the time of the hearing. As discussed in this decision, the price increase is intended to cover only a part of the current cost of shipping milk long distances on a regular basis to meet increased fluid milk needs of the largest population center in the marketing area. As an intentional consequence, the amendment will have only a minimum impact on returns to producers so as not to encourage additional production or to further discourage the production of milk that is necessary to meet the fluid milk needs of the market.

(uu) The Secretary's decision explains that there is no need to delay the effective date of the location adjustment change until June 1, 1985, when existing school contracts expire, as follows (50 Fed. Reg. at 9672-73):

> Exceptions filed on behalf of Houston handlers request that, in the event that their arguments in opposition to any price do not prevail, amendatory action be delayed until June 1, 1985, when existing school contracts expire. Exceptors contend that annual school contracts are awarded on a bid basis and that an increase in the minimum order price would immediately force handlers having such contracts into loss situations.
>
> Record evidence indicates that school contracts are awarded to bidders who prevail by fractions of a cent. However, there is no evidence in the record to indicate how handlers anticipate monthly changes in prices or how such changes may be incorporated into school contracts. In the absence of any evidence concerning potential problems with existing contracts, it cannot be concluded that it is necessary to delay implementation of the amended order.
>
> . . . .

(vv) The Secretary's decision contains the "boilerplate" language included as to all such amendatory action, as follows (50 Fed. Reg. at 9677):

> <u>General Findings</u>
>
> The findings and determinations hereinafter set forth supplement those that were made when the Texas order was first issued and when

it was amended. The previous findings and determinations are hereb ratified and confirmed, except where they may conflict with those se forth herein.

(a) The tentative marketing agreement and the order, as hereb proposed to be amended, and all of the terms and conditions thereo will tend to effectuate the declared policy of the Act;

(b) The parity prices of milk as determined pursuant to section of the Act are not reasonable in view of the price of feeds, availabl supplies of feeds, and other economic conditions which affect mark supply and demand for milk in the marketing area, and the minimum prices specified in the tentative marketing agreement and the order, a hereby proposed to be amended, are such prices as will reflect th aforesaid factors, insure a sufficient quantity of pure and wholesom milk, and be in the public interest. . . .

Conclusions

I. Burden of Proof and Scope of Review.

The fact that petitioners have the burden of proof in this proceeding that this is not a proceeding to "second guess" the Secretary's p judgments, is set forth in many decisions, e.g., *In re Michaels Dairies*, 33 Agric. Dec. 1663, 1701-02 (1974), *aff'd*, No. 22-75 (D.D.C. Aug. 21, 1 *printed in* 34 Agric. Dec. 1319 (1975), *aff'd mem.*, 546 F.2d 1043 (D.C. Dec. 17, 1976), which states:

> It is well settled that the burden of proof in an 8c(15)(A) review proceeding rests with the petitioner. Petitioner in this proceeding ha the burden of proving that the challenged Order provisions an obligations imposed upon it were "not in accordance with law" (7 U.S.C. 608c(15)(A)). See *Lewes Dairy, Inc. v. Freeman*, 401 F.2d 308, 316-317 (C.A. 3), certiorari denied, 394 U.S. 929; *Boonville Farms Cooperative, Inc. v. Freeman*, 358 F.2d 681, 682 (C.A. 2); *United States v. Mills*, 315 F.2d 828, 836, 838 (C.A. 4), certiorari denied, 374 U.S. 832, 375 U.S. 819; *Windham Creamery, Inc. v. Freeman*, 230 F. Supp. 632, 635-636 (D.N.J.), affirmed, 350 F.2d 978 (C.A. 3), certiorari denied, 382 U.S. 979; *Bailey Farm Dairy Co. v. Jones*, 61 F. Supp. 209, 217 (E.D. Mo.), affirmed, 157 F.2d 87 (C.A. 8), certiorari denied, 329 U.S. 788; *Wawa Dairy Farms v. Wickard*, 56 F. Supp. 67, 70 (E.D. Pa.), affirmed, 149 F.2d 860, 862-863 (C.A. 3); *In re Clyde Lisonbee*, 31 Agriculture Decisions 952, 961 (1972); *In re Fitchett Brothers, Inc.*, 31 Agriculture Decisions 1552, 1571 (1972).

The inquiry here does not encompass questions of policy, desirability, or the evaluation of the effectiveness of economic and marketing regulations issued pursuant to the Act. See *In re Independent Milk Producer-Distributors' Assoc.*, 20 Agriculture Decisions 1, 18 (1961); *In re Charles P. Mosby, Jr., d/b/a Cedar Grove*

Farms, 16 Agriculture Decisions 1209, 1220 (1957), affirmed, Southern Dist. Miss., January 5, 1959. See, also, *Pacific States Co. v. White*, 296 U.S. 176, 182.

The responsibility for selecting the means of achieving the statutory policy and the relationship between the remedy selected and such policy are peculiarly matters of administrative competence. *American Power Co. v. S.E.C.*, 329 U.S. 90, 112; *Secretary of Agriculture v. Central Roig Co.*, 338 U.S. 604, 610-614.

Without a showing that the action of the Secretary was arbitrary, his action is presumed to be valid. *Benson v. Schofield*, 236 F.2d 719, 722 (C.A.D.C.), certiorari denied, 35 2 U.S. 976; *Reed v. Franke*, 297 F.2d 17, 25-26 (C.A. 4). Mere assertions of illegality are not sufficient to have an order provision or administrative decision declared illegal. *In re College Club Dairy, Inc.*, 15 Agriculture Decisions 367, 373 (1956).

There is a presumption of regularity with respect to the official acts of public officers and, "in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." *United States v. Chemical Foundation*, 272 U.S. 1, 14-15. Accord: *Reines v. Woods*, 192 F.2d 83, 85 (Emerg. C.A.); *National Labor Relations Board v. Bibb Mfg. Co.*, 188 F.2d 825, 827 (C.A. 5); *Woods v. Tate*, 17 1 F.2d 511, 513 (C.A. 5); *Pasadena Research Laboratories v. United States*, 169 F.2d 375, 381 (C.A. 9), certiorari denied, 335 U.S. 853; *Laughlin v. Cummings*, 105 F.2d 71, 73 (C.A.D.C.). Specifically, administrative orders and regulations are presumed to be based on facts justifying the specific exercise of the delegated authority. *United States v. Rock Royal Co-op.*, 307 U.S. 533, 567-568 (a case under the Act involved herein); *Thompson v. Consolidated Gas Co.*, 300 U.S. 55, 69; *Pacific States Co. v. White*, 296 U.S. 176, 185-186.

The scope of review is set forth in § 10(e) of the Administrative Procedure Act as follows (5 U.S.C. § 706):

§ 706 Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

. . . .

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute.

The "narrow" scope of review under the arbitrary and capricious standa (just quoted (5 U.S.C. § 706(2)(A)) is set forth in *Citizens to Preserve Overt Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), as follows:

> Section 706(2)(A) requires a finding that the actual choice made was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (1964 ed., Supp. V). To make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. . . . Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.

The Court further stated in *Bowman Transp., Inc. v. Ark.-Best Freig System, Inc.*, 419 U.S. 281, 290 (1974):

> But we can discern in the Commission's opinion a rational basis for its treatment of the evidence, and the "arbitrary and capricious" test does not require more.

The "narrow" scope of review under § 706(2)(A), i.e., "arbitrary, capriciou an abuse of discretion, or otherwise not in accordance with law," and the fac that it "forbids the court's substituting its judgment for that of the agency," i explained in *Ethyl Corp. v. EPA*, 541 F.2d 1, 34-37 (D.C. Cir. 1975) (en banc) (footnotes omitted), *cert. denied*, 426 U.S. 941 (1976), as follows:

> This standard of review is a highly deferential one. It presumes agency action to be valid. . . . Moreover, it forbids the court's substituting its judgment for that of the agency, . . . and requires affirmance if a rational basis exists for the agency's decision. 73/ . . .
>
> This is not to say, however, that we must rubber-stamp the agency decision as correct. To do so would render the appellate process a

superfluous (although time-consuming) ritual. Rather, the reviewing court must assure itself that the agency decision was "based on a consideration of the relevant factors * * *." 74/ Moreover, it must engage in a "substantial inquiry" into the facts, one that is "searching and careful." *Citizens to Preserve Overton Park v. Volpe, supra*, 401 U.S. at 415, 416, 91 S.Ct. at 823, 824, 28 L.Ed.2d at 152, 153. This is particularly true in highly technical cases such as this one.

> A court does not depart from its proper function when it undertakes a study of the record, hopefully perceptive, even as to the evidence on technical and specialized matters, for this enables the court to penetrate to the underlying decisions of the agency, to satisfy itself that the agency has exercised a reasoned discretion, with reasons that do not deviate from or ignore the ascertainable legislative intent.

Greater Boston Television Corp. v. FCC, 143 U.S. App. D.C. 383, 392, 444 F.2d 841, 850 (1970), *cert. denied*, 403 U.S. 92 3, 91 S.Ct. 2229, 2233, 29 L.Ed.2d 701 (1971). . . .

There is no inconsistency between the deferential standard of review and the requirement that the reviewing court involve itself in even the most complex evidentiary matters; rather, the two indicia of arbitrary and capricious review stand in careful balance. The close scrutiny of the evidence is intended to educate the court. It must understand enough about the problem confronting the agency to comprehend the meaning of the evidence relied upon and the evidence discarded; the questions addressed by the agency and those bypassed; the choices open to the agency and those made. The more technical the case, the more intensive must be the court's effort to understand the evidence, for without an appropriate understanding of the case before it the court cannot properly perform its appellate function. But that function must be performed with conscientious awareness of its limited nature. The enforced education into the intricacies of the problem before the agency is not designed to enable the court to become a superagency that can supplant the agency's expert decision-maker. To the contrary, the court must give due deference to the agency's ability to rely on its own developed expertise. . . . The immersion in the evidence is designed *solely* to enable the court to determine whether the agency decision was rational and based on consideration of the relevant factors. . . . It is settled that we must affirm decisions with which we disagree so long as this test is met. 76/ . . .

Thus, after our careful study of the record, we must take a step back from the agency decision. We must look at the decision not as the chemist, biologist or statistician that we are qualified neither by training nor experience to be, but as a reviewing court exercising our

narrowly defined duty of holding agencies to certain minimal standards of rationality. 77/ "Although [our] inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one." *Citizens to Preserve Overton Park v. Volpe, supra*, 401 U.S. at 416, 91 S.Ct. at 824, 28 L.Ed.2d at 153. We must affirm unless the agency decision is arbitrary or capricious. 78/

The "narrow" scope of review under the "arbitrary and capricious standard, under which "a court is not to substitute its judgment for that o the agency," with examples of when a court should reverse an agency, is se forth in *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mu Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), as follows:

> The scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). In reviewing that explanation, we must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., supra*, at 285; *Citizens to Preserve Overton Park v. Volpe, supra*, at 416. Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

In the same case, the Court recognizes that an agency "changing its cour by rescinding a rule" has a heavier burden than usual, *viz.* (463 U. S. at 42

> Accordingly, an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.

However, immediately thereafter, the Court recognizes that an agenc ust be free to change its course when circumstances change, viz. (id.):

> In so holding, we fully recognize that "[r]egulatory agencies do not establish rules of conduct to last forever," *American Trucking Assns., Inc. v. Atchison, T.&S.F.R. Co.*, 387 U.S. 397, 416 (1967), and that an agency must be given ample latitude to "adapt their rules and policies to the demands of changing circumstances." *Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968).

Relying on the Court's "changing its course" statement quoted in the second preceding paragraph, the ALJ subjected the Secretary's 1985 decision to a more critical review, stating (Initial Decision at 19):

> When an agency reverses its former views, the standard used to judge whether or not it acted in accordance with law is not the same standard used to judge an agency's initial refusal to promulgate a rule.

I am not sure whether the ALJ was referring to a reversal by the Secretary in 1985 of his 1975 merger decision or his 1984 Partial Final Decision, or both, but, in either case, there was no reversal. First, as to the 1975 merger decision, as shown below (§ § VI(B)(2)(b), VII(F)), that decision was based on the 1973-74 hearing record involved in the merger proceeding, which is a completely different hearing record from the 1983 hearing record involved here. The fact that in 1975 the Secretary refused to increase the location adjustment for Zone 8 *based on the evidence in the 1973-74* hearing record, while he increased the location adjustment for Zone 8 *based on the 1983 hearing record*, is not a reversal of position which imposes any higher standard on the Secretary than if he had not previously refused to increase the location adjustment 10 years earlier. The Secretary's action in 1985 is the *first* time that he considered whether to raise the location adjustment *based on the facts and circumstances contained in the 1983 hearing record.*

Second, as to the Secretary's 1984 Partial Final Decision, the ALJ's reliance on the "reversal" doctrine in *Motor Vehicle Mfrs.* would have been correct if the Secretary had issued a final decision in 1985 as to the location adjustment contrary to findings or conclusions in his 1984 Partial Final Decision, since both decisions were based on the same 1983 hearing record. But, as explained below (§ VI(B)(1)(b)), a careful reading of both decisions reveals that there is no inconsistency. The Secretary did not in 1985 reverse any views expressed in 1984. Accordingly, the ALJ's belief that the "reversal" standard should apply is erroneous.

It has been recognized that a court's deference to administrative expertise "rises to zenith" in milk marketing cases because of the complexity of the regulatory program. As the court stated in *Blair v. Freeman*, 370 F.2d 229, 232 (D.C. Cir. 1966):

> A court's deference to administrative expertise rises to zenith in connection with the intricate complex of regulation of milk marketing. Any court is chary lest its disarrangement of such a regulatory equilibrium reflect lack of judicial comprehension more than lack of executive authority.

The unusual complexity of the milk marketing regulatory program has been recognized in numerous cases. For example, Judge Learned Hand stated in *Dairymen's League Coop. Ass'n, Inc. v. Brannan*, 173 F.2d 57, 65-66, *cert. denied*, 338 U.S. 825 (1949):

We are indeed aware how great an advantage familiarity with t multifarious ramifications of such a subject as milk regulation giv to administrators, and how much less favored are we who must plun, into it unequipped. Nevertheless, we should have to endow them wi almost supernatural powers, if they were not, like ourselves, at tl outset stunned and confounded by the fantastic proliferation whi emerges, when one attempts to find a path through such verbal ma7 [of a milk order]. . . .

. . . .

. . . The regulation of an industry such as this . . . is ε undertaking of monstrous difficulty; it yet remains to be seen wheth success is within the compass of human abilities. Those charged wi such duties must proceed as best they can, correcting their initi blunders, as experience teaches; some ineptitudes and some injustic are inevitable at the start; they are the price of the undertaking as whole.

Judge Clark similarly stated in *Crowley's Milk Co. v. Brannan*, 198 861, 862 (2d Cir. 1952):

It is now no secret that governmental regulation of the distributio of milk is complex and mystifying. Even so, this case appears to set record of its own. For the question of classification for the purpose (payment of the milk product here in issue, at first blush apparentl simple, has baffled even the experts and the trade for several years.

In *Waddington Milk Co. v. Wickard*, 140 F.2d 97, 102 (2d Cir. 1944) court observed:

The order is complicated and detailed; certainly it appears more likel to achieve fairness in the greater number of cases then any we car think of or suggest.

The Seventh Circuit, in an outstanding opinion upholding an administra decision under a milk order, notwithstanding the fact that the administra requirements could, to a disinterested observer, appear "to be a marvel xample of government nuttiness," creating a "necessity for [a] weird piece uman behavior" (*County Line Cheese Co . v. Lyng*, No. 86-2357, slip op. at 7th Cir. July 9, 1987) (concurring opinion by Chief Judge Bauer)), states (p. at 10, n.1):

"The milk problem is so vast that fully to comprehend it would require an almost universal knowledge ranging from geology, biology, chemistry and medicine to the niceties of the legislative, judicial and administrative processes of government." *Queensboro Farm Products, Inc. v. Wickard*, 137 F.2d 969, 975 (2d Cir. 1943) (Frank, J.).

The court in *County Line* also quotes the holding in *Queensboro* that (*id.* at 10):

> "The Supreme Court has admonished us that interpretations of a statute by officers who, under the statute, act in administering it as specialists advised by experts must be accorded considerable weight by the courts." (footnotes omitted) 137 F.2d at 980. Similar weight is due the Secretary's [the court's footnote is quoted immediately above] interpretation of the regulations he propagates. *United States v. Larionoff*, 97 S. Ct. 2150, 2155, 431 U.S. 864, 872 (1977).

In *Ogden Dairy Co. v. Wickard*, 157 F.2d 445, 446 (7th Cir. 1946), *cert. denied*, 330 U.S. 827 (1947), the court stated that the "complexities " of the milk program "are immediately apparent," and in *United States v. Lehigh Valley Coop. Farmers*, 183 F. Supp. 80, 8 9 (E.D. Pa. 1960), *rev'd on other grounds*, 287 F.2d 726 (3d Cir. 1961), *rev'd*, 370 U.S. 76 (1962), the court referred to the milk regulatory program as a "very complicated area of Federal regulation . . . ." From my own 25-year involvement with the milk regulatory program, I share the foregoing views as to the complexity of the milk regulatory program and the litigation arising under the program.[6]

Here, as in *Driscoll v. Edison Light & Power Co.*, 307 U.S. 104, 122 (1939) (concurring opinion by Mr. Justice Frankfurter), the Secretary was dealing with issues that do "not present questions of an essentially legal nature in the sense that legal education and lawyers' learning afford peculiar competence for their adjustment."

II. Different Types of Location Adjustments.

Before considering the validity of the location adjustment at issue in this proceeding, it is important to recognize that the term "location adjustments" (or "location differentials") has been used in connection with a number of types of adjustments, some of which have nothing to do with transportation costs. Different types of location adjustments are described in a final decision with respect to the New York milk order as follows (22 Fed. Reg. 4194, 4212-15 (1957)):

> Location differentials will be discussed herein under three headings as follows:
>
> 1. Transportation differentials. Differentials applicable both to class prices paid by handlers and to uniform prices received by producers which are designed primarily to recognize the differing values because of the cost of transporting milk and milk products from country plants to metropolitan New York-New Jersey.

[6]From 1950 to 1960, I participated in every milk case appealed to the Federal appellate courts. Since July 1972, I have decided every milk case appealed to the Secretary.

2. Nearby differentials. Differentials paid out of the pool, applicable to the uniform price to producers located relatively near the metropolitan New York-New Jersey area, and which reflect factors other than the cost [of] transportation.

3. Direct delivery differentials. Differentials paid by handlers directly to producers delivering milk to specified locations reflecting factors other than those associated with varying transportation costs.

Transportation differentials. . . .

. . . .

Differentials to reflect the expected differences in value of fluid milk (Classes I-A and I-B) because of transportation costs to the metropolitan area should be set so that class prices vary by 1.4 cents for each 10-mile zone. Using the 201-210 mile zone as the base zone, differentials should increase the base prices by 1.4 cents for each zone between the 201-210 mile zone and the 1-10 mile zone. Likewise, the differentials for zones beyond the 201-210 mile zone should decrease the prices by 1.4 cents for each ten miles from the base zone.

. . . .

Nearby differentials. Order No. 27 has always provided for special location differentials applicable to milk in the counties relatively near the metropolitan area. These differentials traditionally have applied to milk delivered to plants in such areas, but with the coming of bulk farm tank delivery, the location differentials with respect to that type of delivery have been based on location of the farm and the history of the farm in relation to such differentials as well as on the location of the plant to which the milk was delivered. . . .

. . . .

Several factors and considerations have been advanced in support of nearby location differentials among which are (1) increased cost of production in the area, (2) they have been paid historically, (3) the inherent value of nearby milk to the market because of its availability and the high quality of such milk, (4) the more intimate relation between producer and dealer, (5) they compensate nearby producers for a relatively more even seasonal production, and (6) they compensate the nearby producers for the reduction in his share of the fluid market resulting from participation in a marketwide pool.

. . . .

> Direct delivery differentials. Proponents of a single order and separate orders both proposed that handlers pay an additional differential known as "direct delivery differentials." . . .
>
> . . . .
>
> Among the reasons given in support of these proposals were the following: (1) such milk is worth more to dealers; (2) producers incur added costs in delivering directly to pasteurizing and bottling plants; (3) provides for better equalizing of dealer's product cost, particularly in the metropolitan area where the major part of the supply is received from country plants rather than by direct delivery; (4) reflects existing practice; (5) needed to guarantee an adequate supply of milk at city bottling plants; (6) to encourage the shift from country receiving of milk to the more efficient direct shipment from farms to city plants; and (7) to insure that the potential savings in more efficient handling of milk be returned to producers.

Following the decision in *Blair v. Freeman*, 370 F.2d 229, 232-39 (D.C. Cir. 1966) (§ VII(B), *infra*), holding that the "nearby differential" provision of the New York milk order is not a valid location adjustment since it "hinges not on the place of delivery, but on the location of the producer's farm" (370 F.2d at 236), the Secretary abandoned the position that "nearby differentials" can be justified as a "location" differential. *Zuber v. Allen*, 396 U.S. 168, 180 (1969) (nearby differentials not authorized by any of the "adjustments" in § 8c(5)(A)). In *Zuber v. Allen* (396 U.S. at 188 n.24) (§ VII(A), *infra*), the Court quotes Kessel, *Economic Effects of Federal Regulation of Milk Markets*, 10 J. Law & Econ. 51, 6 5 (1967) that--

> However weak the case for zone differentials that fail to depict transportation costs, it is infinitely stronger than the case for location differentials.

As the Court recognizes in its footnote citing Kessel, Kessel's mild criticism of "zone differentials that fail to depict transportation costs" refers to "transportation differentials" based on transportation costs, while his "infinitely stronger" criticism of "location differentials" refers to "nearby differentials," based on the location of the producer's farm.

Even with respect to transportation differentials, "which are designed primarily to recognize the differing values because of the cost of transporting milk and milk products" (22 Fed. Reg. 4194, 4212 (1957)), it is important to recognize that under some marketing conditions, milk delivered to a handler's plant located at a considerable distance from the base zone (or market center) is *less* valuable to the handler, in which case a *minus* location adjustment *reduces* the price paid by the distant handler; whereas under other marketing conditions, milk delivered to a distant handler is *more* valuable (because of the added transportation service), in which ca se a *plus* location adjustment

increases the price paid by the distant handler. This is explained immediately below.

The farm installation of bulk tanks, i.e., cold wall tanks installed in farm milk houses, did not begin until 1938 (which is after the enactment of the Act in 1937). Prior to 1938, and for sometime thereafter, milk of many producers was delivered at country receiving plants far removed from the market center. Some milk would be processed at the country plant, in which case the handler would incur additional transportation costs moving the packaged products to market, but frequently the milk would be transferred by the handler (at the handler's expense) to a processing and distributing plant located closer to the market center. Under the circumstances described in this paragraph, milk delivered at distant country receiving plants is *less* valuable than milk delivered by the producer to the handler's plant located near the market center. Hence a minus location adjustment would be applicable at the country plant, *reducing* the price paid by the handler for milk received at the distant receiving station.[7]

As an example of plus and minus location differentials, the transportation differential in the 1957 New York milk order, quoted above in this section, used the 201-210 mile zone from the market as the base zone. Handlers receiving milk at country plants located farther away paid *less* for their milk because of transportation costs the handler would have to incur in transporting the milk to the metropolitan area (i.e., 1¼¢ per cwt less for each 10-mile zone). Conversely, handlers receiving milk at plants located closer to the market than the base zone paid *more* than the base price (1¼¢ per cwt more for each 10-mile zone) (22 Fed. Reg. 4194, 4212-13 (1957)).

Under marketing conditions such as those involved in the present case, producers perform an economic service of benefit to handlers by transporting milk a considerable distance from the base zone, Zone 1 (which includes Dallas, Texas), to more distant plants, e.g., in Zone 8 (which includes Houston and Beaumont, Texas). Under these circumstances, the distant handler pays more for his milk under the location adjustment than handlers located in the base zone. The same type of circumstances were involved in *Sunny Hill Farms Dairy Co. v. Hardin*, 446 F.2d 1124, 1125-31 (8th Cir. 1971) (§ VII(D), infra), which upheld an additional 15¢ per cwt charge imposed on the only handler located in Cape Girardeau County, which is approximately 120 miles south of the St. Louis, Missouri, base zone.

Irrespective of whether the distant handler pays more or less for his milk, under an order's location adjustment, the principle is the same, i.e., the handler is paying for the value of his milk, depending on the location at which it is delivered. If milk delivered at a distant location from the base zone is less valuable (because the handler will have to pay the transportation costs involved in transporting milk from a country receiving station to the consumption center), a minus location adjustment reduces the price paid by

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[7]For a discussion of the delivery of milk to country receiving plants, and the changes brought about in the marketing structure after farm bulk tanks began to be installed in 1938, see W.W. Tyler, *A Story of Milk* 27-28 (New York n.d.) (prepared under the direction and supervision of the New York-New Jersey Milk Market Administrator); and Consumer & Mktg. Serv., U.S. Dep't of Agric., *The Federal Milk Marketing Order Program* 36, 39-42 (Marketing Bulletin 27, rev. Apr. 1968) ("Location differentials represent the cost of transporting milk from the production area to the consuming area" (*id.* at 36)).

the distant handler. But if the producer performs an economic service of benefit to the handler by delivering milk to a handler at a plant closer to the consumption center, or to a handler in a deficit area located a substantial distance from the base-zone, a plus location adjustment increases the price paid by the distant handler, in order to compensate the producer for the economic service provided. As shown in § III(D), *infra*, it is well established that the value of all commodities depends, in part, upon the location at which the product is delivered.

Plus location adjustments increase the price paid to the particular producers performing the transportation service, and minus location adjustments decrease the price paid to the particular producers delivering milk that has a reduced location value (7 C.F.R. § § 1126.60-.78).

III. The Secretary's Principal Intent in Increasing the Location Adjustment Applicable to Zone 8 Handlers Was to Make the Order's Pricing Structure More Equitable by Requiring Handlers in Zone 8 to Compensate Producers for Providing the Economic Service of Transporting Milk to Zone 8, an Extremely Deficit Area. Petitioners Do Not Challenge the Secretary's Findings that the Increased Location Adjustment Does Not Exceed the Additional Transportation Costs Involved in Transporting Milk a Substantial Distance to Zone 8, Zone 8 Has the Largest Population Center in Texas, It Is Growing Rapidly, and It Is an Extremely Deficit Milk Production Area. The Act Authorizes Such a Location Adjustment.

The Secretary's lengthy decision must be broken into segments for the purpose of analysis, notwithstanding a temporary loss of the "big picture." Each subsection in this analysis of the Secretary's decision bears, more or less, on each of the others. All of the material in all the subsections must be understood in order to properly understand and appreciate what is said in a particular subsection. Accordingly, after the Secretary's decision has been studied in a segmented fashion, it must be assimilated as a whole by the reader.

A. The Secretary Concluded that the Location Adjustment for Zones 8 and 9 Should Be Computed on the Basis of Transportation Costs of 3¢ Per Cwt Per 10 Miles. Petitioners Do Not Contend that that Rate Exceeds Actual Hauling Costs.

In determining the amount of the location adjustments for Zones 8 and 9 (the only two zones where the record indicated that an adjustment of the location adjustment should be considered (Findings 5(v), (x)-(z), (aa), (cc)-(ee), (gg), (kk), (oo); and see Findings 5(s)-(u), (w), (hh)), the Secretary computed the location adjustments on the basis of transportation costs of 3¢ per cwt per 10 miles, which is a conservative estimate of actual hauling costs

based on record evidence showing hauling rates varying from 3.2¢ to 3.5¢ per cwt per 10 miles.[8] The Secretary's decision states (Finding 5(gg)):

> There is no broad-based statistical evidence in the record from which any precise transportation rate can be calculated that would represent a marketwide average variable cost of hauling milk. However, evidence presented through a number of witness[es] indicated various costs or charges that are applicable in the Texas and surrounding marketing areas for hauling bulk milk. The hauling charges ranged from $1.60 to $1.80 per loaded mile. The lower charge, which converts to a rate of 3.2 to 3.5 cents per hundredweight per 10 miles, depending on the weight of the load, is AMPI's freight rate quotation for hauling services provided to buyers and such charge was also attributed to an independent hauler. In addition, Mid-Am indicated that it pays $1.64 per loaded mile for transporting milk on regular long distance hauls. Although this evidence does not establish a precise average or standard market price for milk transportation services, it does show that the cost of hauling bulk raw milk is significantly greater than 1.5 cents per hundredweight per 10 miles.
>
> In view of the lack of certainty over the extent to which hauling costs have increased, a conservative estimate of hauling costs should be used to consider the location adjustment change that is necessary at this time. If location adjustments were based on a rate in excess of costs, significant economic incentives could be created to move milk to obtain hauling profits. A conservative hauling rate, which falls short of covering actual costs, would maintain incentives to implement hauling efficiencies.
>
> In view of the above, the hauling rate should be slightly below the lowest rate identified on the record as being representative of the cost of hauling milk in the Texas marketing area. It is concluded that a rate of 3 cents per hundredweight per 10 miles should be used to consider the location adjustments that are appropriate for Zones 8 and 9 of the marketing area. Such rate should encourage the continued implementation of hauling efficiencies and at the same time cover a significantly greater proportion of current hauling costs than are currently reflected under the order.
>
> Exceptions filed on behalf of Schepps and Houston handlers contend that the 3-cent rate does not reflect current hauling costs. Schepps contends that such rate is insufficient to cover current costs in that hauling charges identified in the record were in excess of 3.5 cents per hundredweight per 10 miles. Houston handlers, although acknowledging that 1.5 cents does not cover current costs, contend

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[8]The Secretary's decision to use the 3¢ rate only in Zones 8 and 9 was not arbitrary or capricious (see § V, *infra*).

that there is no evidence to support the conclusion that the 3-cent rate represents a conservative estimate of current costs.

The record identifies a number of current charges that prevail in the marketing area for hauling bulk milk as previously discussed. As previously stated, the record does not establish a precise, average, marketwide rate of transportation. It does, however, contain sufficient information to establish a conservative rate.

The Secretary's determination that 3¢ per cwt per 10 miles is a conservative estimate of the cost of transporting bulk milk is consistent with the congressional finding, expressed a few months later in connection with the Food Security Act of 1985, that it "now costs about 3.4 cents per hundredweight per ten miles to move milk" (H.R. Rep. No. 271, 99th Cong., 1st Sess., pt. 1, at 24, *reprinted in* 1985 U.S. Code Cong. & Admin. News 1103, 1128 (§ IV, *infra*)).

Furthermore, the Secretary's finding that it now costs at least 3¢ per cwt per 10 miles to haul bulk milk is not challenged by petitioners on appeal. As the ALJ states (Initial Decision at 24):

A. The Increased Cost of Hauling Milk to Houston.

This finding is undisputed and amply supported by record evidence.

B. Petitioners Do Not Challenge the Secretary's Findings that Zone 8 Has the Largest Population Center in Texas (Houston/ Beaumont), Which Is Growing Fast, that Zone 8 Is an Extremely Deficit Milk Production Area (Importing About 87% of Its Milk), and that Zone 8 Had to Reach Out the Farthest for Milk (Over Half of Zone 8's Milk Had to Be Transported Over 251 Miles).

The Secretary found that "there are three dominant consumption centers within the [Texas] marketing area (Zone 1-Dallas/Ft. Worth; Zone 8-Houston/Beaumont; and Zone 9-San Antonio) that combined, accounted for about 67 percent of the total marketing area population" (Finding 5(s)). The Secretary also found that "[f]rom 1970 to 1980, the population increase for Zones 1, 8, and 9 was 24.2 [percent for Zone 1], 37.8 [percent for Zone 8] and 20.2 percent [for Zone 9]" (*id.*). (In other words, the population of Zone 8 was increasing at a much faster rate than either of the other two dominant consumption centers.) The Secretary further found that, "[w]ith the increase in population, Zone 8 accounted for 29 percent of total marketing area population in 1980, surpassing Zone 1 as the most heavily populated area [in Texas]" (*id.*).

The Secretary found that "Zone 8 is extremely deficit in terms of local [milk] production, and that substantial quantities of milk must be shipped long distances to meet the fluid milk needs of Zone 8 plants" (Finding 5(j); see also, Findings 5(f), (q), (r), (t)-(v), (aa) and (cc)). Specifically, the Secretary found that during May 1983, Zone 8 produced only 13½% of the

bulk milk received by Zone 8 plants, which is a much smaller percentage than the comparable statistics for the other southern deficit zones. (Zone 9, the second most deficit area, produced 30.8% of its fluid milk needs.) During the tighter supply month of October 1982, Zone 8 produced only 11.7% of its fluid needs. Hence Zone 8 was dependent on imported milk for about 87% to 88% of its fluid milk needs.[9] The Secretary found (Finding 5(t)):

> The ratios of zone production to bulk fluid milk receipts at distributing plants illustrate the degree to which Zones 7 through 12 are deficit in terms of zone production. During May of 1983, the ratios of production within each zone to the amount of bulk milk received were 48.4 percent for Zone 7 (Austin), 13.5 percent for Zone 8 (Houston), 30.8 percent for Zone 9 (San Antonio), 44.2 percent for Zone 11 (Corpus Christi), and 42.0 percent for Zone 12 (Edinburg). No ratios were computed for Zone 10 since there are no longer any distributing plants located in such zone. The most deficit zones contain the major consumption centers of Houston and San Antonio. During October 1982, when the market supply/demand relationship was tighter than in May 1983, the ratios of production to receipts for Zones 8 and 9 were 11.7 and 24.8 percent, respectively.

The Secretary found that the "increasing population, particularly in the major population centers in Zones 8 and 9, continues to rely on the major milk producing regions in North Texas for fluid milk needs" (Finding 5(t)). The Secretary further found with respect to Zone 8, which is the most deficit milk area in Texas (Findings 5(f), (j), (q), (r), (t)-(v), (aa) and (cc)), that it had to reach out the farthest of any of the zones to satisfy its milk needs, with more than half of the bulk milk shipped to Zone 8 plants originating more than 251 miles from Houston. The Secretary found (Finding 5(u) (emphasis added)):

> Evidence in the record establishes that plants located in the southern deficit Zones 7 through 12 (exclusive of Zone 10) must reach out varying distances to obtain the necessary supplies of milk for fluid use. As one would expect, plants in Zone 7, which is adjacent to the supplies of milk available in Zones 3 and 5, reach out the least distance to obtain their supplies. In July 1983, the weighted average distance of actual milk movements to Zone 7 plants was about 84 miles from Austin, with over 90 percent of the milk movements being less than 150 miles. For Zone 8, however, the weighted average distance of milk movements to Houston was almost 200 miles. In terms of milk movements in 50-mile increments, 49 percent of the milk supplies originated between 251 and 300 miles from Houston and more than half of the milk shipped to Houston fluid milk plants was produced more than 251 miles from Houston.

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[9] See § V, *infra*, as to petitioners' deceptive and erroneous argument that any "arbitrary line which isolates a metropolitan area from its supply areas creates by definition a 'deficit area' within the City limits despite the availability of adequate supplies in the marketing area as a whole" (Answer of Petitioners to Respondent's Appeal Petition at 63).

Plants at San Antonio in Zone 9 reach out about 161 miles, on a weighted average basis, to obtain milk supplies. About 40 percent of the milk received at distributing plants originated in areas between 201 and 250 miles from San Antonio. Consequently, plants in Zone 9 do not reach out quite as far for milk as plants in Zone 8, although San Antonio is about 33 miles farther south from Dallas than is Houston.

The weighted average distance of milk movements to plants in Zones 11 and 12 is about 118 and 120 miles, respectively. Most of the milk supplies for Zone 11 are obtained from areas within 200 miles of Corpus Christi whereas plants in Zone 12 reach between 201-250 miles from Edinburg for a large proportion of total supplies.

Milk moves greater distances on a regular basis to meet fluid milk needs of plants in Zones 8 and 9 (Houston and San Antonio) tha[n] with respect to the other southern deficit zones. Also, it is obvious that substantial quantities of milk must be transported over these long distances to meet the needs of these major population centers. Also, record evidence establishes that both the distances and quantities moved have increased substantially over a period of years (1961 to 1983) and that the greatest northward expansion of the procurement areas has occur[r]ed with respect to Zones 8 and 9.

The current distance from which Zone 8 plants must obtain milk supplies extends to the heavy milk producing counties in North Texas that are located northeast of Dallas. This area includes Hopkins County, which is the largest milk producing county in the Texas marketing area, as well as three of the other top ten producing counties (Franklin, Upshur and Wood). More than half of the bulk milk shipped to Zone 8 distributing plants originates beyond 251 miles from Houston, and the distance from Houston to Sulphur Springs (the County Seat of Hopkins County) is 253 miles.

Zone 8 plants also obtain substantial volumes of milk from the heavy producing areas of Comanche and Erath Counties that are located southwest of Dallas. Stephenville, the County Seat of Erath County, is 267 miles from Houston.

Plants in Zone 9 also reach to the heavy producing areas of north Texas for substantial supplies of milk, primarily the counties of Comanche and Erath. San Antonio is 205 miles from Stephenville and about 40 percent of the milk shipments to Zone 9 plants originate between 201 and 250 miles from San Antonio. The procurement area for Zone 9 does not extend to any significant degree to the Hopkins County area, which is about 335 miles from San Antonio as measured to Sulphur Springs.

C. The Secretary Concluded that the Zone 8 Location Adjustment No Longer Represents a Sufficient Degree of the Added Service or Cost Involved in Supplying Milk to Zone 8 Handlers, and Should Be Increased to Provide a More Equitable Pricing Structure.

Based on all of the record evidence, the Secretary concluded that the "current Zone 8 location adjustment no longer represents a sufficient degree of the added service or cost involved in supplying milk to plants in such area" (Finding 5(cc)). Specifically, the Secretary states (*id.*) (emphasis added):

> Exceptors' views overlook basic market facts and evidence contained in the record and logical conclusions that are set forth in this decision, which establish the need to increase the location adjustment in Zone 8. The Houston area has experienced a significant increase in population and an increasing proportion of milk supplies from distant areas must be obtained to meet fluid milk needs. At the same time, transportation costs have increased to the point that the current Zone 8 location adjustment no longer represents a sufficient degree of the added service or cost involved in supplying milk to plants in such area.

In reaching his decision, the Secretary recognized that the purpose of location adjustments is "to reflect the cost of transporting milk from production areas to consuming centers" (Finding 5(mm)). That is, the Secretary's decision states (*id.*):

> Also, the decision is consistent with the application and purposes of location adjustments throughout the Federal milk order system; namely, to reflect the cost of transporting milk from production areas to consuming centers.

The Secretary's intent in increasing the location adjustment for Zone 8 was to make the order's pricing structure more equitable "by assessing more of the costs associated with moving the milk into Zone 8 upon those plants that receive the milk and occasion the costs" (Finding 5(qq)). Specifically, the Secretary's decision states (*id.*) (emphasis added):

> As previously stated, the purpose of location adjustments is to provide incentives for the delivery of supplies of bulk milk to various plant locations. The evidence in the record establishes that the cost of hauling milk to Houston is in excess of the transportation allowance provided under the order and that inequities among producers and handlers[10] have resulted because of an inability of the over-order pricing structure to effectively recover the costs or to apportion the

[10]The inequities among producers are discussed in § VI(B)(1), *infra*, and the inequities among handlers are discussed in § VI(B)(2), *infra*.

costs equitably among handlers. As a result, handlers and producer[s] in northern areas, at various times and to various degrees, have subsidized the costs incurred in shipping milk to the Houston area. Consequently, the major thrust of the pricing proposal and the intent of the decision is to establish a more equitable pricing structure by assessing more of the costs associated with moving the milk into Zone 8 upon those plants that receive the milk and occasion the costs.

In other words, the Secretary determined that it was time to end the "free ride" that had been given to Zone 8 handlers. It was time for the Zone 8 handlers to pay, under the location-adjustment provisions of the order, for the economic service provided by the producers in transporting milk a great distance from the production areas to (the extremely deficit) Zone 8, where it was needed.

On appeal, petitioners do not contest the evidentiary support for the subsidiary findings referred to in subsections III(A) and (B), *supra*, which are the only vital findings necessary to support the Secretary's location adjustment for Zone 8. That is, petitioners do not challenge the fact that (i) Zone 8 (Houston/Beaumont) is now the largest consumption center in Texas, (ii) it is the fastest growing of the dominant consumption centers, (iii) almost 90% of Zone 8's milk must be transported a great distance into the zone, because it produces only about 12% to 13% of its fluid milk needs, (iv) over half of Zone 8's bulk milk has to be transported more than 251 miles, and (v) the 3¢ per cwt per 10 miles transportation rate used by the Secretary to determine the location adjustment does not exceed the transportation costs involved in transporting milk to Zone 8.

D. The Plain Terms of the Act and its Legislative History Expressly Authorize a Location Adjustment, Such as the One Involved Here, that Recognizes the Location Value of Milk, and Compensates Producers for Providing the Economic Service of Transporting Milk to a Deficit Area.

The Act expressly authorizes adjustments in the uniform minimum price paid by handlers for milk, and the blend price paid to producers, based on the "locations at which delivery of such milk" is made. Specifically, the Act provides (7 U.S.C. § 608c(5)(A), (B)):

(5) Milk and its products; terms and conditions of orders

In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all

handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for . . . (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers:

(B) Providing:

. . . .

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered;

subject, in either case, only to adjustments for . . . (c) the locations at which delivery of such milk is made. . . .

The location adjustment at issue here is based on the location at which delivery of milk is made to the handlers, i.e., the location adjustment is made because the handlers are located in Zone 8, an extremely deficit area that is a considerable distance from the supply area (§ III(B), (C), *supra*). Accordingly, the location adjustment is expressly authorized by the plain language of the Act.

Although the words of the Act are plain, the legislative history is, nonetheless, helpful since it shows that Congress intended for the permitted adjustments to be made for sound economic reasons, such as to recognize differences in the location value of milk because of transportation costs.[11] Specifically, the legislative history states (H.R. Rep. No. 1241, 74th Cong., 1st Sess. 9-10 (1935) (emphasis added)):[12]

Third. Subsection (5) of the proposed section 8c states specifically the terms which may be included in orders relating to milk and its products. These terms follow the methods employed by cooperative associations of producers prior to the enactment of the Agricultural Adjustment Act and the provisions of licenses issued pursuant to the present section 8 (3) of the Agricultural Adjustment Act. Such orders may contain provisions classifying milk in accordance with its ultimate utilization, and may fix, or provide a method for fixing, minimum prices which shall be paid by handlers to producers for milk in each

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[11]In the absence of the legislative history, it could have been argued that a mere difference in location is sufficient reason to require one handler to pay higher prices than another governed by the same order. The legislative history shows that, in addition to meeting the literal language of the Act (by basing a difference in price on a difference in location), the difference in price must also be based on economic benefit to the handler paying a higher price, or economic loss to the handler paying a lower price (see, e.g., *Fairmont Foods* (§ VII(C), *infra*))

[12]Virtually identical legislative history is set forth in S. Rep. No. 1011, 74th Cong., 1st Sess. 9-10 (1935).

use classification. This provision makes it possible to take into consideration in orders dealing with milk, the difference in value between milk sold for consumption in fluid form and that used in the manufacture of such products as butter, evaporated milk, etc.

Minimum prices fixed in such orders are required to be uniform as to all handlers, subject to adjustments for differences in the grade and quality of the milk delivered, for differences in transportation costs from the place at which delivery is made to the handler to[13] the distributing or processing plant, and for volume, market, and production differentials customarily applied by handlers. The volume differential is a differential which is paid when the operations of several country plants are consolidated into one plant. The inconvenience which is caused to producers by closing up plants to which they have been delivering and requiring that all of their milk be handled by one plant, is compensated by an additional payment to the producers. The production differential is the differential which is paid to a producer, compensating him for keeping his farm and milk qualified for a city market even though his milk may actually be going into manufactured use. It is necessary to keep this supply of reserve milk available for periods in which consumption of milk goes up so that the effect is that the producers must keep their farm in the same condition as if they were shipping milk into the city every day. The production differential is a payment to the farmer for performing this function in the market.

The market differential is a differential which is given to the producer to compensate him for delivering his milk to a city market instead of to a country plant. These differentials vary with the markets and cannot be qualified as a "location" differential, because of the fact that location is usually determined on the distance from a primary market whereas market differentials are usually paid in secondary markets.

The legislative history makes it clear that the location adjustment is based on the fact that the value of milk depends, in part, on the location at which it is delivered. Specifically, the legislative history refers to adjustments for differences in the transportation costs from (1) the place at which delivery is made to the handler (e.g., a country supply plant) to (2) the distributing or processing plant (located near the consumption center). This shows that Congress recognized that milk delivered to a handler's plant located near a consumption center is more valuable to the handler than milk delivered to a

[13]The word "to" appears as "or" in the earlier Senate Report (S. Rep. No. 1011, 74th Cong., 1st Sess. 10 (1935)), which, I believe, is an inadvertent error. But, in any event, either version makes it clear that location adjustments relate to "differences in transportation costs. . . ."

distant receiving plant, where the handler will have to incur the additiona expense of transporting the milk to the consumption center.

Mechanically, such a difference in value could be recognized in a mill order (i) by a plus location adjustment, i.e., by making the base point (wher handlers pay the Class I price) at the farthest point at which milk is received and having a plus location adjustment for milk delivered at plants closer to the consumption center, (ii) by a minus location adjustment, i.e., by making the base point at the consumption center, and having a minus location adjustmen for milk delivered at more distant points, or (iii) by a combination of plus and minus location adjustments, such as were included in the New York milk order, referred to in § II, *supra*. Each of the three methods can compensate producers, and charge handlers, based on the location value of the milk delivered to the handler.

As explained in § II, *supra*, when the Act was originally enacted, bulk tank delivery of milk had not yet begun, and the customary marketing structure frequently involved the delivery of milk to distant receiving stations, far removed from the consumption center, with the handler then incurring the additional expense of transporting the milk. That is the situation Congress had in mind in the legislative history of the Act, discussed above. However, Congress used broad language which expressly applies to the facts of this case, e., the use of a location adjustment to differentiate between (i) the value of ilk that is delivered to a consumption center located near the production ea (Zone 1 (Dallas)), and (ii) the value of milk that is delivered to a eficit) consumption center located a substantial distance from the roduction area (Zone 8 (Houston/ Beaumont)), thereby compensating producers for the service of delivering milk to handlers in a distant, deficit area. (As explained in *Schepps Dairy, Inc. v. Bergland*, 628 F.2d 11, 16 (1979) (quoted in the background material set forth at the outset of this decision), the same principle of recognizing the location value of milk underlies the entire Class I price structure under Federal milk orders (east of the Rocky Mountains), i.e., the Class I price for each order increases by an amount based on transportation costs[14] from the Minnesota-Wisconsin production area.)

It is well settled that the plain language of the statute is controlling even though the precise factual situation involved here may not have been contemplated by Congress when it enacted the Act. As stated in *Barr v. United States*, 324 U.S. 83, 90 (1945):

> We may assume that the dual or multiple exchange rates which have emerged were not in contemplation when the 1930 Act was passed. As we have noted, they are parts of rather recent measures for the control and restriction of foreign exchange and export transactions. But if Congress has made a choice of language which fairly brings a given situation within a statute, it is unimportant that the particular application may not have been contemplated by the

[14]As explained in § IV, *infra*, Class I prices have not been adjusted, over the years, to fully reflect *increasing* transportation costs, resulting in the congressional realignment of Class I prices, to reflect increased transportation costs, in the Food Security Act of 1985.

legislators. *Puerto Rico v. Shell Co.*, 302 U.S. 253, 257; *Browder v. United States*, 312 U.S. 335, 339, and cases cited.[15]

Similarly, in *Browder v. United States*, 312 U.S. 335, 339-40 (1941), the Court states:

> Old laws apply to changed situations. The reach of the act is not sustained or opposed by the fact that it is sought to bring new situations under its terms. While a statute speaks from its enactment, even a criminal statute embraces everything which subsequently falls within its scope.

Since the location adjustment at issue here, which is to compensate producers for providing the economic service (of benefit to handlers in Zone 8) of transporting milk a substantial distance to an extremely deficit area, is expressly authorized by the location adjustment provisions of the Act, as construed in the light of its legislative history, there is, of course, no need to find any *other* statutory authorization. Specifically, there i s no need to show that the location adjustment is also authorized by the uniformity provisions of § 8c(5)(A) and (B) of the Act as to producers or handlers, which immediately precede the location adjustment provisions. By a parity of reasoning, it is not necessary to find that the location adjustment satisfies any of the *other* broad objectives of the Act, such as the objective of establishing orderly marketing conditions, or ensuring an adequate supply of milk. It is enough to show that the location adjustment accomplishes the broad congressional objective of pricing milk according to its location value.

As shown below (§ VI), the location adjustment here does accomplish *other* broad objectives of the Act. But a location adjustment can be established solely for the purpose of satisfying the broad objective of having handlers pay for their milk based upon its value, considering the location at which the milk is delivered to the handler.

In other words, the express terms of the Act and its legislative history show that one of the broad objectives of the Act is to have handlers pay for the value of their milk depending on a variety of circumstances, including the location at which the milk is delivered to the handler. Congress thus recognized in the Act the elementary principle of economics that the "utility" or "value" of a commodity exists in at least three elements--space, form, and time. The "space," or "location," factor is explained in G. Shepherd, G. Futrell & J. Strain, *Marketing Farm Products* 18-21 (6th ed. 1975), as follows:

> Space
>
> The buyers and sellers who constitute the market for a particular commodity are usually scattered over a considerable territory. This

[15] *Accord NLRB v. Lion Oil Co.*, 3 52 U.S. 282, 292 (1957); *Ozawa v. United States*, 260 U.S. 178, 195-98 (1922).

does not preclude the application of the concept of a perfect market the concept is merely broadened. The uniform price which distinguishes a perfect market is uniform over the area, plus or minus any necessary transportation and handling charges between buyers and sellers in different parts of the territory.

The idea of a "price surface" is helpful here. Where the market covers a considerable territory, the price surface is seldom flat like the surface of an ocean. The surface is highest at the points where the local demand is greatest relative to the local supply. But so long as the high point does not get higher, by more than a transportation and handling charge, than prices in the nearest surplus territory, the market is still perfect. The price surface for milk in the United States based on 1974 prices, is shown in Figure 2.1. The low point in this price surface lies in the Minnesota-Wisconsin area. This is a heavy milk-producing area and is the primary supply source for milk-deficit points; it is also an area of substantial production of manufactured dairy products. The price peaks are generally in a circle extending out from the Minnesota-Wisconsin supply area and are found in the Atlantic and Gulf coast states and in the Southwest.

The difference from the low to the high price points correspond roughly with the costs of transportation and handling. About 75 per cent of the price variation between the different areas is associated with distance. This relationship between milk prices and distance from Wisconsin is shown in Figure 2.2.

The expansion of the concept of a market to cover a geographical area does not introduce any complications into the theory of price determination, other than the transportation-cost differential mentioned in the preceding paragraph. The group of buyers and sellers may be concentrated at one point, or at several points, or it may be widely scattered. Prices are determined by the whole group in either case. For example, all the trading in butter might take place in one room in New York, with prices posted currently on a blackboard where all the buyers and sellers could see them. This would approach a perfect market (that is, it would reflect supply and demand conditions accurately), since all buying and selling prices would be known to all the buyers and sellers, and the prices that would just move the existing supply into consumption would be continuously and accurately determined.

If because of overcrowding, another office were opened up across the street, or for that matter several hundred miles away in Chicago with prices and orders handled telegraphically, there would be no change in the situation, economically speaking. There is no reason why prices (adjusted for transportation charges) would be different from what they were before. If each buyer and seller knew accurately what the buying and selling prices of the others were, they would act the same as if they were all together in one room. The thought may

be carried further. If many offices were opened in a large number of small towns with only one or two buyers and sellers in each town but all well provided with current price information, the situation would still be unchanged. Prices still would be determined in the same manner and would be the same as before.

The point may be generalized as follows: When a group of buyers and sellers are all together, trading in one room with prices and other information posted where everybody can see them, the requirements of the perfect market are approximated. If the group is widely scattered but the market knowledge possessed by traders is unimpaired, the market is equally good. Each buyer or seller has an effect on the market price proportional to the volume of his purchases or sales, but no more; Smith's 1,000 bushels added to the supply cut the demand curve at a lower point to the same extent as the sum of ten other farmers' 100 bushels each; no one buyer or collection of sellers or buyers can "set the price" in the one case more than in the other. Fundamentally, competition is just as good in the scattered market as in the concentrated market. For competition does not depend upon having all buyers in one room, or in one stockyard, so that they can rub elbows. It depends upon buyers and sellers being in touch with each other's prices, not with each other's persons. If buyers and sellers do not know each other's prices, it does not matter how close to each other they are physically; and if they do know each other's prices, by radio or Teletype or any other means, it does not matter how far apart they are physically.

The abstract concept of the perfect market is useful in that it provides a standard, a sort of sea-level point from which to measure aberrations in prices over the area where buyers and sellers are scattered. If prices at one point are more than transportation and handling charges above prices at another point, then the prices at the one point are too high, or are too low at the other. Which point is out of line, and by how much, can be determined by comparison with still other points in the area.

The same principle is more succinctly stated in A.C. Manchester, *Pricing Milk and Dairy Products--Principles, Practices, and Problems* 39 (Econ. Res. Serv., USDA, Agricultural Economic Report No. 207, June 1971), as follows:

Classified Pricing in Space, Form, and Time

Economic theory has long recognized that utility exists in at least three forms--space, form, and time. Prices that users are willing to pay, as reflected in their demand schedules, include these three elements.

> Prices of raw milk sold by farmers to processors are differentiated on the basis of some of these elements. Typically, prices differ by location by the estimated cost of transportation between points. Thus, milk at the farm brings a lower price than milk delivered to the processor's plant.

If Congress had failed to provide for adjustments in the "uniform" handler and producer prices based on the locations at which the delivery of milk is made to handlers, equity among producers and handlers would have been totally destroyed, since uniform prices that fail to recognize the location factor would have produced inequality. As Mr. Justice Frankfurter states, dissenting in *New York v. United States*, 331 U.S. 284, 353 (1947): The Procrustean bed is not a symbol of equality. It is no less inequality to have equality among unequals.

Or, as Mr. Justice Frankfurter states, dissenting in *Dennis v. United States* 339 U.S. 162, 184 (1950):

> It was a wise man who said that there is no greater inequality than the equal treatment of unequals.

Under the plain terms of the Act and its legislative history, the *only vita* *indings* by the Secretary in the present case are that the location adjustmen or Zone 8 does not provide greater compensation to producers than th increased transportation costs incurred by producers in providing th economic service, of benefit to handlers in Zone 8, of transporting milk substantial distance to Zone 8 (with over half of Zone 8's milk transporte more than 251 miles). The Supreme Court has recognized that the statutor differentials to uniform prices, including location adjustments, are t "compensate or reward the producer for providing an economic service c benefit to the handler." *Zuber v. Allen*, 396 U.S. 168, 1 83-84 (1969) (§ VII(A), *infra*). *Accord Schepps Dairy, Inc. v. Bergland*, 628 F.2d 11, 18 (D.C Cir. 1979) (§ VII(F), *infra*); *Borden, Inc. v. Butz*, 544 F.2d 312, 316 (7th Ci 1976) (§ VII(E), *infra*); *Sunny Hill Farms Dairy Co. v. Hardin*, 446 F.2d 112- 1128-29 (8th Cir. 1971) (§ VII(D), *infra*); *Fairmont Foods Co. v. Hardin*, 44 F.2d 762, 766-67 (D.C. Cir. 1971) (§ VII(C), *infra*).

After the Secretary found that an increase in the Zone 8 locatio adjustment was appropriate to compensate producers *under the pricin provisions of the order* for providing the economic service of transporting mil a substantial distance to the extremely deficit Zone 8, it was not vital for th Secretary to also find that the location adjustment served any other purpos e.g., to establish more equitable conditions among producers and handlers, o to eliminate disorderly marketing conditions that could lead to an insufficien supply of milk for Zone 8 handlers. (If the Secretary made unnecessar findings not supported by evidence (which is not the case here (see § V *infra*)), the most that a reviewing tribunal should do is to remand the case t the Secretary to determine whether he would have increased the locatio adjustment even if he had known that the unnecessary findings were no supported by evidence.)

IV. The Food Security Act of 1985, Amending § 8c(5)(A) of the Act, and Its Legislative History, Show that Congress Intends for the Location Adjustment Provisions of § 8c(5)(A) to Be Used to Reflect the Cost of Moving Milk from Surplus to Deficit Areas.

The congressional view expressed in § 131 of the Food Security Act of 1985 (Pub. L. No. 99-198, 99 Stat. 1354, 1372-73 (1985), 7 U.S.C. § 608c(5)(A) (Supp. III 1985)), and in its legislative history, is strongly supportive of the Secretary's action here.

Section 131 of the Food Security Act of 1985 sets forth the Class I price differential (i.e., the amount that is added to the M-W price to produce the order's Class I price) that is to be in effect in each of the 44 milk marketing orders throughout the 2-year period beginning on the effective date of the amendment (i.e., May 1, 1986) (7 U.S.C. § 608c note (Supp. III 1985)), "and subsequent to such 2-year period unless modified by amendment to the order involved" (7 U.S.C. § 608c(5)(A) (Supp. III 1985)).[16] The Class I price

[16] In enacting § 131 of the Food Security Act of 1985, Congress was confused as to the mechanics of milk orders, but the legislative intent is clear. Prior to the amendment, § 8c(5)(A) authorized provisions--

> (A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers. . . .

Congress amended that section by adding at the end thereof the following (99 Stat. 1354, 1372 (1985)):

> "Throughout the 2-year period beginning on the effective date of this sentence (and subsequent to such 2-year period unless modified by amendment to the order involved), the minimum aggregate amount of the adjustments, under clauses (1) and (2) of the preceding sentence, to prices for milk of the highest use classification under orders that are in effect under this section on the date of the enactment of the Food Security Act of 1985 shall be as follows:

A table then follows listing the "Minimum Aggregate Dollar Amount of Such Adjustments Per Hundredweight of Milk Having 3.5 Percent Milkfat."

The legislative history, quoted below, shows clearly that Congress intended to set forth in the table the minimum Class I price differentials for each of the 44 milk marketing orders. But the Class I price differentials are not, in fact, adjustments under clauses (1) and (2) of § 8c(5)(A). For practical reasons, the Class I price in milk orders is not set forth as a specific amount, e.g., $10 per cwt, but, rather, is set forth as a formula, *viz.*, the sum of the Minnesota-Wisconsin price, which is commonly known as the basic formula price (see, e.g., 7 C.F.R. § 1126.51), and a specific amount (e.g., $2.32 (7 C.F.R. § 1126.50(a)), which is commonly known as the Class I price differential. The Class I price (which *includes* the Class I price differential) is the minimum price that all handlers are required to pay for milk disposed of in the form of a fluid milk product, subject to three adjustments, including the two adjustments under clauses (1) and (2) of § 8c(5)(A) referred to in the amendatory legislation. Those adjustments *change* the uniform price for particular handlers, depending on particular circumstances involving the handlers. The congressional confusion, in erroneously thinking that the Class I price differential is an *adjustment* to the Class I price, rather than an integral part of the Class I price

differential for the Texas order was established by Congress at $3.28 (99 1373; codified at 7 U.S.C. § 608c(5)(A) (Supp. III 1985)), an increase o over the $2.32 Class I price differential then in effect (7 C.F.R. § 1126.5

Immediately following the table listing the congressionally-mandated I price differentials for the 44 milk orders, § 131 of the Food Security A 1985 states (7 U.S.C. § 608c(5)(A) (Supp. III 1985)):

> Effective at the beginning of such two-year period [May 1, 1986], th minimum prices for milk of the highest use classification shall b adjusted for the locations at which delivery of such milk is made t such handlers.

The legislative history of the Food Security Act of 1985 is most he to the Secretary's position here. The legislative history states (H.R. Rep. 271, 99th Cong., 1st Sess., pt. 1, at 22-24, *reprinted in* 1985 U.S. Code C & Admin. News 1103, 1126-28):

> Orders establish minimum prices which must be paid by handlers to farmers for milk used in various ways. The current minimum order prices for milk used in fluid form are, however, in many cases inadequate to cover the cost of supplying the fluid market. This has resulted in payments by handlers greater than the minimum order price in order to assure an adequate supply of milk for the fluid market. The variability of "over-order charges" has caused instability that the federal milk order program was designed to alleviate.
>
> The last major changes made by the Department of Agriculture to Class I price differentials were in the late 1960's. Since costs, including transportation, assembly, and handling, have increased substantially during that time, the Committee feels it is necessary to adjust the fluid milk differentials in 35 of the 44 federal milk orders so that the prevailing minimum order prices will better cover the cost of supplying these markets. This action will reduce the need for over-order payments and providing equity among handlers supplying the market.
>
> . . . .
>
> The bill provides for differential adjustments under the provisions of the Agricultural Marketing Agreement Act of 1937, which sets up the milk marketing orders in 44 marketing order areas. The bill requires that specified minimum levels be set for a two-year period following enactment of this law. It limits the adjustments to the highest use classification of milk under the current orders.
>
> In the implementation of the minimum prices for highest use classification of milk, the Secretary is also required to make necessary

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hat is subsequently adjusted under the three clauses set forth above, is of no consequence he ince the legislative history is so clear as to the congressional intent.

location adjustments within each order in order to assure that the new adjustments are effective throughout the order. In addition, the Secretary is required to address the varied locations of delivery of milk throughout each marketing order.

The purpose of the Agricultural Marketing Agreement Act of 1937 is to use milk marketing orders as instruments for stabilizing marketing conditions for fluid milk. The Act of 1937 also states that minimum prices established by orders shall be uniform as to all handlers subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such an order, (2) the grade or quality of milk purchased, and (3) the location at which delivery of such milk, or any classification thereof, is made to such handlers.

Furthermore, under the agricultural adjustment Act of 1949, provisions require that milk be supported at specific prices established by the Secretary in accordance with the law. Under the price support program, the objective was the establishment of the price necessary in order to maintain an adequate supply of milk to meet current needs and to maintain the productive capacity to meet anticipated future needs.

It is noted that the 1983-1984 diversion program exacerbated milk supply deficiencies in certain areas of the country. The prevailing minimum Federal order prices do not reflect the cost of moving milk from surplus to deficit areas. The result is therefore an ineffectiveness of the Order System to assure an adequate supply of milk for fluid use in deficient areas. The proposed marketing order minimums included in Title I will facilitate the acquisition of an adequate supply of milk for fluid use in those deficit areas.

The proposed changes in the marketing order minimums will more fully address the cost of transferring milk from the surplus areas to the deficit areas which in turn will assist in providing a more uniform price to handlers or uniform payments to producers. At the moment, there are three major problems with respect to the operation of the Federal order systems: (1) minimum Federal order Class I prices are not adequate to attract the necessary supply to meet the Class I needs in deficit areas; (2) handlers who must go outside their territory to acquire additional milk incur greater costs for milk than handlers who obtain all of their milk from the local area; and (3) those producers who assume the responsibility of supplying the needs of the market have to pay the cost of transporting supplemental milk, resulting in producers not receiving uniform prices.

There have been expressed concerns that implementation of minimum Class I prices would set a precedent in regard to

management of Orders. The Secretary has not made permanen adjustments since the late 1960's. The Act does not suggest that mil be locally produced nor that it come from any specific area. It on requires that milk be attracted to those locations where it is needed fo fluid use. The manner in which to attract milk is through adjuste prices. In deficit areas, that means the price must be high enough t cause it to be moved from where it is being produced to where it needed. Class I differentials under the orders are not high enough t do this under today's cost of transportation. It now costs about 3 cents per hundredweight per ten miles to move milk; however, whe the Class I differentials under Federal orders were established, it wa at a rate of about 1.5 cents per hundredweight per ten miles. Despit this dramatic increase in transportation costs, the minimum prices hav not been permanently increased.

The congressional report just quoted was issued September 13, 198 6 months after the Secretary's final decision at issue here. Hence congressional report and the Secretary's decision are based on the general industry conditions.

The congressional report shows that, notwithstanding the natio surplus milk situation, Congress was concerned with assuring, *throug price mechanisms of the milk marketing orders*, an adequate supply of mil fluid use in deficit areas. The ALJ and petitioners criticize the Secre decision on the ground that there was no shortage of milk for fluid n But in the same factual setting, Congress expressed the view that *the provisions of the milk orders*, including the location adjustments, *should e that milk will be shipped to deficit areas*.

Congress also expressed the view in the report that over-order ch were causing instability that the Federal program was designed to alle and that order prices, including location adjustments, should provid incentive to move milk to deficit areas, rather than over-order ch Congress felt that this would result in greater actual uniformity to han and producers than over-order charges. That, too, was the Secretary's in his 1985 final decision at issue here.

Congress expressly stated in the report that the desired uniform pri handlers and uniform payments to producers were not being achieved be the market order prices did not adequately reflect transportation Congress further recognized in the report that those producers who as the responsibility of supplying the needs of the market, i.e., the coopera have to pay the transportation costs, resulting in the cooperative membe receiving the desired uniform prices. The same views are expressed i Secretary's 1985 report at issue here.

The general tenor of the congressional report is critical of the Secre failure to adequately reflect transportation costs in the Class I differentials and location adjustments. This congressional report emasc most of the objections by the ALJ and petitioners to the Secretary's decision.

In short, in the Food Security Act of 1985, Congress recognized the circumstances recognized by the Secretary in his 1985 decision at issue and Congress required the Secretary to adjust the location differe

throughout the country to reflect transportation costs, for the same reasons set forth in the Secretary's final decision at issue here. There is, therefore, no merit to petitioners' and the ALJ's view that the Secretary lacked statutory authority to increase the location adjustment for the reasons given in the Secretary's final decision.

The location adjustment for Zone 8 established by the Secretary as a result of § 131 of the Food Security Act of 1985 is plus 54¢, i.e., the identical location adjustment established effective May 1, 1985 (at issue here).[17] No change was made in the location adjustment for Zones 1, 3-5, and 7-12, as a result of the Food Security Act of 1985. The following table shows the changes in the location adjustments for Zones 1 to 12 of the Texas Order made by the Secretary as a result of § 131 of the Food Security Act of 1985, effective May 1, 1986 (7 C.F.R. § 1126.52(a)(1) (1985 and 1987)):

	Location Adjustment Prior to Food Security Act	Changed Location Adjustment Under Food Security Act
Zone 1	No adjustment.	Same.
Zone 1-A	Minus 12 cents.	Minus 25 cents.
Zone 2	Plus 6 cents.	No adjustment.
Zone 3	Plus 15 cents.	Same.
Zone 4	Plus 18 cents.	Same.
Zone 5	Plus 20 cents.	Same.
Zone 6	Plus 25 cents.	No adjustment.
Zone 7	Plus 30 cents.	Same.
Zone 8	Plus 54 cents.	Same.
Zone 9	Plus 42 cents.	Same.
Zone 10	Plus 53 cents.	Same.
Zone 11	Plus 66 cents.	Same.
Zone 12	Plus 75 cents.	Same.

V. The Secretary's Determinations to Apply the 3¢ Per Cwt Per 10 Miles Hauling Rate Only to Zones 8 and 9, and to Refine the Alignment of Prices by Considering Alternative Outlets for Milk and Changes in the Location of Milk Production, Were Not Arbitrary or Capricious.

The ALJ's decision brushes aside the Secretary's findings as to the essential basis for the Secretary's action set forth in § III above, including the finding that "transportation costs have increased to the point that the current Zone 8 location adjustment no longer represents a sufficient degree of the

[17]A new § 8c(15)(A) petition was filed on January 8, 1987, challenging the Secretary's continuation of the 54¢ location adjustment for Zone 8, following a new hearing held March 4-7, 1986. *In re Borden, Inc.*, AMA Docket No. M 126-10. The Secretary's challenged final order is at 51 Fed. Reg. 44,590 (1986), based on a final decision at 51 Fed. Reg. 40,176 (1986). The new § 8c(15)(A) case is being held in abeyance until the Judicial Officer's decision in the present case is issued.

added service or cost involved in supplying milk to plants in such area (Finding 5(cc)), by stating (Initial Decision at 26):

> Inasmuch as hauling costs increased throughout the Texas market, a price increase that is wholly based on increased hauling costs and is restricted in application to Zone 8 plant operators, must be set aside as an arbitrary and capricious exercise of agency power that discriminates against the operators of Houston milk plants.
>
> As the decision explains, however, this finding was not the essential basis for the Assistant Secretary's action. . . .

This is the key to the ALJ's erroneous decision! Having brushed aside the essential basis for the Secretary's action, *for which there is express statutory authority*, the ALJ then proceeded to find a *lack of statutory authority* for the Secretary's action in other provisions of the Act (Initial Decision at 27-39).

I agree with the ALJ that there is no statutory authority for the Secretary's action other than the authority to adjust the uniform prices based on the locations at which delivery of milk is made to the handlers, which necessarily permits the Secretary to increase location adjustments when hauling costs increase. But I disagree with the ALJ's view that "a price increase that is wholly based on increased hauling costs and is restricted in application to Zone 8 plant operators, must be set aside as an arbitrary and capricious exercise of agency power that discriminates against the operators of Houston milk plants." We need look no farther than *Sunny Hill Farms Dairy Co. v. Hardin*, 446 F.2d 1124, 1125-31 (8th Cir. 1971) (§ VII(D), *infra*), to see that a location adjustment can, lawfully, single out a *single* handler in the entire marketing area.

Contrary to the ALJ's view, just quoted, a price increase restricted to one zone based on increased hauling costs is not the *end* of the inquiry-- i.e., such a price increase does not *per se* demonstrate arbitrary and capricious action. Rather, it is the *beginning* of the inquiry as to whether such action was arbitrary or capricious. The crucial question is, "Did the Secretary select Zone 8 for a price increase arbitrarily or capriciously, e.g., by throwing a dart at a map of Texas that hit Zone 8, or, more realistically, by failing to consider relevant factors, or did he have a rational basis for his action?" That question can only be answered by looking at the reasons given by the Secretary for his action.

In the present case, the increased hauling rate was not applied to a single handler (as was done in *Sunny Hill*), or even to a single zone. The increased transportation rate of 3¢ per cwt per 10 miles was applied to both Zones 8 and 9 (Findings 5(v), (w), (aa), (gg), (hh)).

Furthermore, the record shows that the Secretary did not apply the increased 3¢ rate only to Zones 8 and 9 in an arbitrary and capricious manner. The Secretary's decision not only considered all of the relevant factors, but he took the most rational action that could have been taken *on the basis of the 1983 hearing record*. Since (i) Zone 1 is the base zone in the Texas order, in which no location adjustment is appropriate, and (ii) the Secretary applied the 3¢ rate to Zones 8 and 9, any question as to why the 3¢ rate was not applied to a particular zone is limited to zones other than

Zones 1, 8 and 9. Are Zones 1, 8 and 9 different from all the other zones? Of course they are!

Zones 1, 8 and 9 have the three dominant consumption centers within the Texas marketing area that account for about 67% of the total marketing area population (Finding 5(s)). Hence the remaining zones consume less than a third of the order's milk. Of the remaining zones, the northern zones are significantly closer to the production areas, and need to import significantly less milk, if any, than Zones 8 and 9.

Zones 8 and 9, which contain the major consumption centers of Houston and San Antonio, are the most deficit zones in Texas, with Zone 8 producing only 11.7% to 13.5% of its required milk, and Zone 9 producing only 24.8% to 30.8% of its required milk (Finding 5(t)). By contrast, Zone 7 produces 48.4% of its milk, Zone 11 44.2%, and Zone 12 42% (*id.*). (There are no distributing plants in Zone 10.)

Petitioners complain particularly about their competitive position vis-a-vis plants in Zones 4, 5 and 9 (Answer of Petitioners to Respondent's Appeal Petition at 62-63). As shown in this subsection, the Secretary applied the 3¢ rate to Zone 9 as well as to Zone 8. That eliminates petitioners' complaint as to Zone 9 (except as to the methodology of applying the 3¢ rate, discussed below in this section). As to Zones 4 and 5, they are dramatically different from Zones 8 and 9, with Zone 4 producing 238% of its milk and Zone 5 producing 698% of its milk (Finding 5(t)). In addition, "Zone 5 represents only about 1.7 percent of total marketing area population" (Finding 5(oo)).

Petitioners argue that Houston is a deficit area only because of the Secretary's arbitrary zone line, stating (Answer of Petitioners to Respondent's Appeal Petition at 63):

> The Secretary's Decision argued that an increased adjustment is necessary because Houston is a "deficit area". That argument ignores the fact that there are few dairy farmers in any true metropolitan area. Any arbitrary line which isolates a metropolitan area from its supply areas creates by definition a "deficit area" within the City limits despite the availability of adequate supplies in the marketing area as a whole. Thus, all cities are "deficit areas" in the same sense as Houston, yet none has been treated in the fashion Houston has been treated in this Decision.

That erroneous argument appears to be deliberately deceptive. The Secretary's statistics as to deficit areas are not statistics for cities. They are statistics for zones (see the map set forth at the outset under the heading "Relevant Provisions of the Regulations"). Zone 8 includes 16 *Texas* counties, *viz.*, Austin, Brazoria, Chambers, Colorado, Fayette, Fort Bend, Galveston, Hardin, Harris, Jefferson, Liberty, Montgomery, Orange, San Jacinto, Waller, and Washington (7 C.F.R. § 1126.2). The 16 counties are large enough to be a state in some areas of the country, or a nation in some areas of the world!

Furthermore, the Secretary relied on other facts, in addition to the fact that Zone 8 is the most deficit zone in Texas. For example, the Secretary relied on the fact that Zone 8 has the largest population center in Texas

(Houston/Beaumont), which is the fastest growing of the major population centers (§ III(B)).

The Secretary also considered the distance milk must be transported to meet the needs of the southern deficit zones (§ III(B), *supra*). Zones 8 and 9 again top the list! The weighted average distances milk had to be transported to the southern deficit zones was 84 miles to Zone 7, 118 miles to Zone 11, 120 miles to Zone 12, 161 miles to Zone 9, and 200 miles to Zone 8 (Finding 5(t)). (Again, there are no distributing plants in Zone 10.) Based on these undisputed facts, the Secretary determined that "a consideration of whether the current order location adjustments are continuing to provide the necessary price incentives for milk movements is critical only with respect to Zones 8 and 9" (Finding 5(v)). The Secretary's conclusion, in this respect, is rational, and thoroughly and clearly explained and supported by undisputed evidence. Accordingly, it was not arbitrary or capricious for the Secretary in 1985 to consider an increase in location adjustments "wholly based on increased hauling costs" restricted in application to plants in Zones 8 and 9 which had the effect of actually increasing the location adjustment only in Zone 8, in view of changed production patterns.

However, it is not necessary to limit our inquiry into whether the Secretary's action was arbitrary or capricious by considering only the undisputed facts referred to above. In deciding whether to exercise his permissive[18] authority to increase location adjustments because of increased hauling costs, the Secretary also looked at other circumstances discussed below (§ VI(B)), which lead in the same direction, such as inequity among producers and handlers (§ VI(B)(1), (2)), which the Secretary described as "disorderly marketing conditions" (§ VI(B)(3)). "[N]o significant testimony or evidence was presented with respect to the need to adjust prices because of disorderly marketing conditions in zones other than Zones 1, 8, and 9" (Finding 5(v)). This, too, shows that the Secretary's action was not arbitrary or capricious.

Of vital importance to a proper understanding of this case is recognition of the fact that, notwithstanding the Secretary's inquiry into inequity among producers and handlers (which he described as disorderly marketing conditions), and the need to have *order provisions* that would provide adequate price incentives for milk to move to deficit Zone 8 (§ VI(B)(4)), he still was exercising his express statutory authority to adjust uniform prices according to the locations at which delivery of milk is made to handlers. No other statutory authority was necessary relating to the other circumstances looked at in determining whether to use his location-adjustment authority.

Turning now to the methodology used by the Secretary in applying the 3¢ per cwt per 10 miles transportation rate to Zones 8 and 9, if the Secretary had used the same basing point as previously used in the order for establishing location adjustments (Dallas), it would have resulted in a location adjustment of 72¢ for Zone 8 (rather than the 54¢ location adjustment determined by the Secretary), and an 81¢ location adjustment for Zone 9 (rather than the 42¢ location adjustment then in effect (Finding 5(hh)). But, in view of changed production patterns, the Secretary determined that "a refinement of the

[18]See *Schepps* (§ VII(F), *infra*).

alignment of prices is necessary" (Finding 5(hh)). The Secretary states (Finding 5(hh)):

> Continuing to align prices from Dallas but at the higher transportation rate of 3 cents per hundredweight would result in location adjustments of 72 cents in Zone 8 and 81 cents in Zone 9. However, in addition to using a higher transportation rate, a refinement of the alignment of prices is necessary to better reflect the different distances that milk must move from common supply areas to alternative outlets, and because of an increase in production in certain areas that are advantageously located to supply the fluid milk needs in Zone 9.
>
> Plants in Zone 9 receive substantial quantities of milk from the heavy producing Comanche-Erath County area that is located southwest of the Dallas/Ft. Worth area. This area is 205 miles from San Antonio (as measured to Stephenville, the County Seat of Erath County). This two-county area also furnishes substantial supplies of milk to Zone 8 handlers but is 267 miles from Houston. On this basis, the location adjustment should be lower for Zone 9 than for Zone 8, which is contrary to the current alignment of prices under the order. Producers in the Stephenville area provide a lesser service by supplying Zone 9 handlers than they provide in supplying Zone 8 handlers since they are 62 miles closer to San Antonio than Houston.
>
> Since Zone 9 handlers have been able to secure a supply of milk from increased production that has occurred in the Comanche-Erath County area, the appropriate location adjustment for Zone 9 should be based on this supply area. However, this two- county area also supplies the major Dallas/Ft. Worth consumption area in Zone 1. The Stephenville area is 97 and 67 miles from Dallas and Ft. Worth, respectively. (Official notice is taken of the Official State Mileage Guide, Texas Statistical Research Service, Austin, Texas.) Producers supplying the Dallas/ Ft. Worth area receive the Zone 1 price and must pay the farm-to- plant hauling cost. Consequently, in order to be indifferent to supplying the San Antonio area, only the additional mileage in moving milk to San Antonio must be considered in establishing the Zone 9 location adjustment. Based on the Dallas/San Antonio alternative, there is a difference of 108 miles, which equates to a location adjustment of 33 cents with the 3-cent hauling rate. Based on the Ft. Worth-San Antonio comparison, the location adjustment would be 42 cents, (205[-]67=138 or 14 ten-mile increments x 3¢) which is the current location adjustment for Zone 9. Consequently, even though hauling costs have increased, no price increase is necessary for Zone 9 because of the increase of production in an area that is advantageously located to supply the fluid milk needs of handlers operating plants in Zone 9.

As just quoted, taking into consideration the changed production a from which Zones 8 and 9 now draw their milk, and the different dista that milk must move from common supply areas to alternative outlets, 3¢ rate resulted in no change in the 42¢ location adjustment for Zo (Finding 5(hh)). The Secretary's consideration of changed production a is economically sound and rational (if not required), and is not wit precedent (e.g., 46 Fed. Reg. 55,876, 55,879 (1981)). In a report to Cong in January 1984, the year before the Secretary issued the decision challe here, the Secretary was criticized for letting location adjustments get "seri out-of-date," and the recommendation was made that the Secretary m changes in location adjustments based "not only [on] changes in hauling c but also [on] changes in the location of production, processing plants, and movements" (Economic Research Service, U.S. Dep't of Agric., *Revie Existing and Alternative Federal Dairy Programs* 76 (Staff Report AGES840121) (Jan . 1984) (referred to as
ERS Report to Congress) (see § VI(A), *infra*)).

Similarly, the distinguished Nourse Committee, composed of the lea experts in the field of dairy marketing (see § VI(A), *infra*), stated i n its report that location adjustments should be "closely related to actual tran costs" (U.S. Dep't of Agric., *Report to the Secretary of Agric. by the Fe Milk Order Study Committee* 23 (Dec. 1962) (referred to as the N Report)). For location adjustments to be "closely related to actual tran costs," consideration must, of course, be given to changed production patt

The additional concept of considering "the different distances that must move from common supply areas to alternative outlets" (Finding 5 quoted above), although somewhat innovative, is quite rational fro economist's viewpoint (see the economic rationale in Findings 5(ii)-(Instead of using Zone 1 (Dallas), the base zone, as the beginning meas point to measure the distance to Zones 8 and 9, it recognizes that Zone and 9 all draw from a common, heavy production area, and measures onl *additional* distance to Zones 8 a nd 9, over the distance to Dallas, from common production area, thereby making producers "indifferent," inso transportation costs are concerned, as to whether they supply Dallas or Z 8 and 9.

There is nothing inherently arbitrary or irrational about that con And the express statutory authority to promulgate location adjustmen milk delivered to handlers, based on the "locations at which delivery o milk . . . is made to such handlers" (5 U.S.C. § 608c(5)(A)), does not the Secretary to any specific formula for determining the exact amount location adjustment. If any specific formula were implied in the stat would be actual, ascertainable transportation costs, which was the view dissenting judge, but not the majority, in *Schepps Dairy, Inc. v. Berglan* F.2d 11, 18-19, 23 (D.C. Cir. 1979) (see § VII(F), *infra*). (The erroneous view (Initial Decision at 37-39) that *Zuber v. Allen*, 396 U. (1969), invalidates the Secretary's methodology, i n this respect, is dis in § VII(A)).

Petitioners argue, based on a series of calculations, that if the approach used by the Secretary here were used in all other zones, the would be "unacceptable" (Answer of Petitioners to Respondent's A Petition at 67). The Secretary succinctly and accurately stated that petiti

argument "is a moot issue since no other price adjustments are provided" (Finding 5(oo)). If there were a location adjustment formula that could be applied in all areas, irrespective of factual differences as to the areas, Congress would have prescribed the location adjustment formula in the statute! But since Congress left this matter open, a method that produces a reasonable result in one zone does not become unreasonable merely because it does not produce reasonable results in other zones.

If the Secretary were required, as a matter of law, to use the same location adjustment formula in every milk order, or even in every zone within the same milk order, a large number of location adjustments would be invalid. The methodology for computing location adjustments for different zones in an order varies widely, depending on all the circumstances that bear on a particular area's location adjustment. For example, in a single final decision involving the Texas order and five other orders, explaining changes made in location adjustments as a result of the Food Security Act of 1985 (51 Fed. Reg. 40,176 (1986)), the Secretary uses hauling rates of 1.7¢ (*id.* at 40,178), 2.1¢ (*id.* at 40,193), 2.2¢ (*id.* at 40,194), 2.25¢ (*id.* at 40,191), 3¢ (*id.* at 40,188), and 3.1¢ (*id.* at 40,186). (The Secretary's other decisions relating to changes in location adjustments arising from the Food Security Act of 1985 are also instructive as to the many variables that have to be considered in changing location adjustments (see 51 Fed. Reg. 20,446, 26,224 (1986); 51 Fed. Reg. 24,677, 44,611 (1986); 51 Fed. Reg. 44,617 (1986)).

Since the facts and circumstances as to individual zones included in a milk order vary considerably, a Procrustean approach is neither desirable nor required. Petitioners' reliance, in this respect (Answer of Petitioners to Respondent's Appeal Petition at 67), on *Contractors Transport Corp. v. United States*, 537 F.2d 1160, 1162 (4th Cir. 1976) ("Patently inconsistent application of agency standards to similar situations lacks rationality and is arbitrary"), is misplaced in view of the divergent facts as to the various zones in the Texas milk order.

Using the same 3¢ rate and the exact methodology used for Zone 9 would have resulted in a 63¢ location adjustment for Zone 8 (rather than the 54¢ location adjustment promulgated) (Finding 5(ii)). However, the Secretary made a further refinement (for Zone 8 only) because of a nearer alternative supply area from where more milk should (for marketing efficiencies) be drawn to Zone 8, which reduced the location adjustment for Zone 8 to 54¢ (Finding 5(jj)). That further refinement also makes a great deal of sense from an economic viewpoint (see Finding 5(jj)), and the same discussion as to the absence of a specific formula in the Act is applicable here. In this respect, the Milk Pricing Advisory Committee (see § VI(A), *infra*) states that "[o]rderliness, in a market context" "implies adjustment of supply to least cost sources" (Milk Pricing Advisory Comm., U.S. Dep't of Agric., *Milk Pricing Policy & Procedures--Part I, The Milk Pricing Problem* 4 (Mar. 1972) (referred to as Advisory Comm. Report)).

Moreover, if the Zone 9 methodology is lawful (which it is), petitioner would not want to attack this further refinement (as to the nearer alternative supply area), because it *lowered* Zone 8's location adjustment by 9¢ (Finding 5(ii), (jj)).

For the foregoing reasons, the Secretary's decision sets forth ratic reasons for applying the 3¢ per cwt per 10 miles hauling rate only to Zo 8 and 9, and his consideration of alternative outlets for milk, and change, the location of milk production, was sound and rational.

VI. In Considering the Level of the Location Adjustment for Zone the Secretary Properly Considered Broad Purposes of the Act Ot than the Purpose to Compensate Producers for Providing tl Economic Service of Transporting Milk to that Deficit Area, viz, Establish Equity Among Producers, to Establish Equity Amoı Handlers, to Eliminate Disorderly Marketing Conditions, and Establish Order Prices that Will Assure an Adequate Supply of M for that Deficit Area Without Over-Order Premiums.

As shown in § § III and IV, *supra*, the increase in the location adjustm for Zone 8 is fully justified on the ground that it compensates producers providing the economic service of transporting milk to handlers in extremely deficit area. But, since the Secretary also considered ot circumstances, and his findings as to them are challenged by petitioners, i necessary to discuss the other circumstances considered by the Secretary.

The other circumstances considered by the Secretary are (1) inequ among producers (Findings 5(d), (i), (j), (l), (m), (r), (w), (x), (aa), (cc), (e (ff), (kk), (qq)), (2) inequity among handlers (Findings 5(d), (i), (j)- (m), (w), (y), (aa), (cc), (ee), (ff), (kk), (qq)), (3) disorderly marketing conditi (Findings 5(f), (q), (r), (v), (aa), (cc), (kk), (oo)), and (4) the price le required to insure an adequate supply of milk for Zone 8 under the pric provisions of the order (Findings 5(f), (q), (r), (t), (v), (w), (aa), (cc), ((kk), (rr)).

Before beginning an analysis of the Secretary's findings with respect these additional circumstances, it is helpful, first, to briefly examine literature in the field. The Secretary's final decision was written by da marketing experts in the Department's Dairy Division, Agricultural Market Service, who are eminently qualified agricultural economists, thoroug familiar with the writings of other agricultural economists in the field.[19] T jargon routinely set forth in lengthy decisions such as the one at issue h cannot fully be understood by a lawyer or a judge completely unfamiliar w the economic works in the field of milk marketing. In addition, the views the nation's leading milk marketing experts should be studied since they tota support the Secretary's final decision at issue here.

A. Views of the Leading Agricultural Economists Who Are Expe in the Field of Dairy Marketing Completely Support t Secretary's Decision.

[19]Most of the Dairy Division's economists have Masters Degrees in Agricultural Econom many with particular emphasis in the field of Dairy Marketing. Most of them have been v the Dairy Division for 20 years or longer. In writing a typical milk decision, two econom draft the decision (including the economist who attended the hearing), and three econom and four or five attorneys (including the attorney who attended the hearing) review decision, before it is presented to the Office of the Secretary.

One of the most authoritative reports on the Federal Milk Order Program was issued by an 18-member committee headed by Dr. Edwin G. Nourse (U.S. Dep't of Agric., *Report to the Secretary of Agric. by the Federal Milk Order Study Committee* (Dec. 1962) (referred to as the Nourse Report)). Since the Nourse Report is so supportive of the Secretary's final decision at issue here, it is worthwhile to set forth a small part of the background of the committee's chairman, Dr. Edwin G. Nourse. Dr. Nourse was Chairman of the Counsel of Economic Advisors, Executive Office of the President, from 1946 to 1949. He was Head of the Economic Departments at the Universities of South Dakota and Arkansas. He was also Chief of the Agricultural Division of the Brookings Institution, and President of the Farm Economics Association. He was a member of the Committee on Nutrition of the League of Nations. He was the author or co- author of more than 50 books or studies (several of which I have read and cited in briefs and decisions).

The other 17 committee members who issued the Nourse Report, all leading experts in the field of agricultural marketing, with special knowledge of milk marketing, are (Nourse Report at iii):

Dr. Gordon M. Cairns, Dean of Agriculture, University of Maryland, College Park, Md.

Dr. David A. Clarke, Jr., Professor, Agricultural Economics, and Agricultural Economist on Giannini Foundation, University of California, Berkeley, Calif.

Dr. Charles E. French, Professor of Agricultural Economics, Purdue University, Lafayette, Ind.

Dr. Edwin W. Gaumnitz, Executive Secretary, National Cheese Institute, and American Butter Institute, Chicago, Ill.

Mr. H. W. Halvorson, Professor of Agricultural Economics, University of Wisconsin, Madison, Wis.

Mr. Gordon C. Laughlin, Consolidated Dairy Products Company, Seattle, Wash.

Mr. Frank Lent, Dairymen's League Cooperative Association, Inc. and Metropolitan Cooperative Milk Producers Bargaining Agency, Syracuse, N.Y.

Mr. Judson P. Mason, Economist, National Milk Producers Federation, Washington, D.C.

Mr. Joe E. Murphey, Marketing Specialist, North Texas Milk Producers Association, Arlington, Tex.

Mr. George N. Pederson, General Manager, Twin City Milk Producers Association, St. Paul, Minn.

Mr. Otie M. Reed, Executive Director, National Creameries Association, Washington, D.C.

Mr. James L. Reeves, Marketing Specialist, Producers Creamery Company, Springfield, Mo.

Dr. Leland Spencer, Professor, Agricultural Economics, Cornell University, Ithaca, N.Y.

Dr. Robert Strain, Assistant Professor, Agricultural Economics, Iowa State University, Ames, Iowa.

Mr. C. W. Swonger, Research Economist, New England Milk Producers Association, Boston, Mass.

Dr. E. E. Vial, Executive Director, Milk Dealers' Association of Metropolitan New York, Inc., New York, N.Y.

Mr. George R. Ware, Dairy Marketing Consultant, Fort Lauderdale, Fla.

The Nourse Report states (Nourse Report at 9, 12-13, 15, 23-24, 31-32 94, 98-99 (emphasis added)):

[p. 9]

The Concept of Orderly Marketing

The classical doctrine that unregulated competition would act as an automatic adjuster of both price and production had merit in its day of small-scale business operators. But as the investment required for an improved herd and for better physical facilities has grown, and as the managerial training of the modern dairy farmer has expanded, it has become less useful and indeed impractical. If fluid milk markets are to have an orderly supply, there must be orderly production, and for orderly production--both efficient and remunerative--there needs to be orderly provision for the physical assembly and distribution, for dependable and equitable contract relations between handlers and producer organizations and between these organizations and their individual members. There need also to be orderly relationships as to prices and supplies between different markets.

. . . .

[p. 12]

. . . [T]he role of the Secretary of Agriculture in administering the milk marketing order system would seem to have four co-ordinate and interrelated parts: (a) to establish a structure of prices among order markets, with differentials between differentiated uses suitable to the scheme of classification and other operative features of the several markets; (b) to see that these differentials and operational features do not permit such unpoliced entry for new producers and "outside" milk as will disrupt orderly operations or inflict confiscatory damage on established producers; (c) not perpetuate or promote uneconomic allocation of productive resources or inequitable market relationships; (d) avoid maintaining or creating a monopoly power that might result in prices inconsistent with the public interest.

. . . .

In brief, then, this committee believes that the Federal milk marketing orders system under the Marketing Agreements Act has the following major objectives:

1. To promote orderly marketing conditions for farmers specializing in the production of fluid milk and thereby improve their income situation at least in the long run;

[p. 13]

2. To administer and supervise the terms of trade in defined milk markets in such manner as to equalize the market power of buyers and sellers and attain reasonable competition but not local monopoly resulting in undue price enhancement;

3. To assure consumers that they will have access to adequate and dependable supplies of high quality milk from the sources best suited both technologically and economically to supply these demands;

4. To complement the efforts of milk producers' organizations to maintain economic order in their industry, and to bring about the co-ordination of price structures and market practices within and between marketing areas, between fluid and manufacturing segments of the dairy industry, and between milk production and other lines of farming;

5. To secure equitable treatment of all parties--producers, dealers, and consumers, not only within each local or regional market but throughout the system;

6. To establish such terms of trade under the orders as will combine maximum freedom of trade with proper protection of

established producers against seasonal or other loss of outlets that would tend to demoralize markets and farming plans.[20]

. . . .

[p. 15]

The regulatory impacts of milk marketing orders run in two directions. On the one side, they promote economic orderliness and commercial equity through a system of classified prices, applied uniformly to all handlers in a given market. On the other side, they promote orderliness and equity among producers through a system of distribution of total returns to individual producers.

. . . .

[p. 23]

Transportation Differentials

The principle of location economics and that of providing substantially equal raw product costs to all competing handlers (both of which we accept as desirable criteria) requires that different [p. 24] prices for Class I milk be established for various locations within any milkshed. The differences between these prices for a given interval of distance from the market center (or "mileage zones") are referred to as "transportation differentials." In general, we subscribe to the theory that these transportation differentials be closely related to actual transport costs.

. . . .

[p. 31]

. . . It must be remembered, however, that a cooperative association operating under an order is not negotiating its Class I price in a free market, but in one undergirded by the minimum prices and other provisions of the order within a system of orders. If cooperatives in a given market regard these prices as insufficient and are confident of their ability to maintain a higher (premium) price, the logic of the situation would be that the order prices are incorrectly established and should be amended or that the order is unnecessary and should be withdrawn.

. . . .

[20]These six "major objectives" are quoted verbatim, and accepted, (i) by the Milk Pricing Advisory Committee, whose report is discussed immediately following this discussion of the Nourse Report, and (ii) in Kessel, *Economic Effects of Federal Regulation of Milk Markets*, 10 J. Law & Econ. 51, 52-53 (1967).

Since the existence of Federal regulation facilitates the use of negotiated premiums by providing the framework within which they can be secured, it is particularly incumbent on the Secretary to see that there is free access of qualified milk to the premium market, that the order system does not become a shelter for monopoly and that the Federal order minimum prices are not unrealistic. In markets where substantial marketwide premium[s] exist, it suggest[s] that new hearings should be held to review the level of the Class I price. If after such a hearing and conclusions, negotiated prices still persist, it raises the question whether the compensatory payment, allocation, or plant qualification provisions of the order should be modified to permit greater freedom of access to the market. In fact, it [p. 32] may raise the question as to whether a Federal order should be continued.

. . . .

[p. 94]

Another element of disorder in price and production relationships results from the negotiation of premiums above established Class I prices in a number of markets. Such premiums introduce an element of instability both within the marketing area affected and in intermarket price relationships.

. . . .

[p. 98]

(3) We believe that it was the clear intent of the Congress that Secretary's orders should provide public assistance to the private enterprise system rather than superseding it. But when free collective [p. 99] bargaining by strong cooperative associations results in negotiated marketwide premiums substantially and persistently above the uniform prices established in the order, an ambiguous and dangerous situation confronts the order system. Either the Class I price in the order is too low or the premium price too high by an "open market" standard.

The Nourse Report states as a matter of economic fact, under the he "THE CONCEPT OF ORDERLY MARKETING," that if fluid milk ma are to have an "orderly supply" (or an adequate supply), there must be, *alia*, "equitable contract relations between handlers and prou organizations" (Nourse Report at 9). The report explains that it is the ro the Secretary "not [to] perpetuate or promote . . . inequitable m relationships" (Nourse Report at 12). The committee states that three o "major objectives" of the Act are (i) "[t]o promote orderly marke conditions," (ii) "[t]o assure consumers that they will have access to adeq

and dependable supplies of . . . milk from the sources best suited economically to supply these demands," and (iii) "[t]o secure equit treatment of all parties--producers [and] dealers [handlers], . . . not only w each local or regional market but throughout the system" (Nourse Repo 13). Milk orders are to promote "economic orderliness and commc equity" as well as "equity among producers" (Nourse Report at 15).

The Nourse Committee agrees with the principle of "location econor (i.e., pricing milk according to its location value), and "subscribe[s] to theory that these transportation differentials be closely related to a transport costs" (Nourse Report at 23).

Where over-order premiums exist, the "logic of the situation woul that the order prices are incorrectly established and should be amen (Nourse Report at 31). Over-order premiums "introduce an elemen instability" (Nourse Report at 94), and present an "ambiguous and dange situation" to the Federal order system (Nourse Report at 99).

The Milk Pricing Advisory Committee,[21] in its Report to the Secre expresses views very similar to those of the Nourse Committee. The l Pricing Advisory Committee states in its published report, Milk Pri Advisory Comm., U.S. Dep't of Agric., *Milk Pricing Policy & Procedures-- I, The Milk Pricing Problem* 4-6, 39, 42 (Mar. 1972) (referred to as Advi Comm. Report) (emphasis added):

[p. 4]

Statutory Authorization and General Objectives

> The concepts of orderly marketing, public interest, adequate supply and parity prices permeate the statutory authorization for Federal milk marketing orders. Inherent in this 1937 authorization was a desire on the part of Congress: (1) to remedy a short-run condition of disruptively low milk prices and chronic surpluses, and (2) to provide a framework for long-run price and income stability for dairy farmers It was therefore declared in Section 2(1) of the Act to be the policy of Congress for the Secretary of Agriculture ". . . to establish and maintain such orderly marketing conditions for agricultural commodities . . . as will establish, as the prices to farmers, parity prices . . . ."

[21]The committee members consisted of nine experts from the United States Depart Agriculture: Dr. Ronald D. Knutson, Staff Economist, Agricultural Marketing Se iairman; Mr. Joel L. Blum, Chief, Program Analysis Branch, Dairy Division, Agricul farketing Service; Mr. Sidney Cohen, Chief, Program Development Branch, Livestock airy Division, Agricultural Stabilization and Conservation Service; Dr. Edward H. K nalyst, Office of Planning and Evaluation; Dr. Floyd A. Lasley, Leader, Dairy G .larketing Economics Division, Economic Research Service; Dr. Alden C. Manchester, (nimal Products Branch, Marketing Economics Division, Economic Research Service; Robert W. March, Deputy Director, Dairy Division, Agricultural Marketing Service; Howard C. Williams, Staff Assistant, Program Evaluation and Appraisal Staff, Agricul Stabilization and Conservation Service; Dr. Jerome B. Siebert, Special Assistant to Secretary, Ex Officio.

Orderliness, in a market context, is the opposite of chaos. It has several different dimensions. In the short-run context, orderliness implies seasonal adjustment of prices to even out milk production while avoiding large short term Class I price changes like those previously associated with seasonal swings in production relative to demand. In the long run, it implies prices which achieve a reasonable balance between production and consumption. Orderliness implies short-term protection of a market from unwarranted movement of milk supplies. At the same time, it implies adjustment of supply to least cost sources as well as to regional changes in production costs. Orderliness implies a proper relationship between fluid and surplus milk prices as well as between blend and manufacturing prices. It [orderliness] implies the [p. 5] establishment of relations between producers and handlers which facilitate fair, but not disruptive, competition among producers and handlers while encouraging the establishment of reliable channels of trade. At the same time, it implies protecting the rights of producers to choose their market outlet, free of coercion and unreasonable barriers to market entry.

This concept of orderly marketing is implicit in Section 2(4) of the Act where it is declared to be the policy of Congress

> " . . . to establish and maintain such orderly marketing conditions . . . as will provide, in the interests of consumers and producers, an orderly flow of the supply thereof to market throughout its normal marketing season to avoid unreasonable fluctuations in supplies and prices."

It is also explicit in the objectives of the Federal milk market order system. The Nourse Committee set forth, and this Committee accepts, the following interpretation of the objectives of Federal milk marketing orders. [1/]

[p. 6]

1/ Edwin G. Nourse et al., *Report to the Secretary of Agriculture by the Federal Ord Study Committee*, December 1962, pp. 12-13. [Quoted above in this subsection (se note p. 15.8, *supra*)].

. . . .

[p. 39]

The payment of over-order prices has been viewed by some as po a conflict with the Secretary's responsibilities under Section 8(c)1

the Marketing Agreement Act which directs him to establish prices a levels necessary to assure an adequate supply of milk.1/ After th Secretary has determined that a particular level of price is needed t carry out the purposes of the Act, it can be argued that any pric negotiated in excess of the level is contrary to the purposes of the Act Holding this point of view, however, ignores that the Act specificall provides for the establishment of only minimum prices. This provisio implies that producers, within the restrictions provided by the Capper Volstead Act, the Agricultural Fair Practices Act, and the antitrus laws, may negotiate premiums over Federal order prices.

1/ Nourse, pp. 30-31.

. . . .

[p. 42]

Premiums may also alter intermarket price relationships. Thes relationships may actually be improved among order markets withi a regional cooperative's territory. However, substantial distortion ma exist with markets outside the cooperative's territory. Handlers ma attempt to obtain supplies from such markets at a lower price Handlers in an adjacent market where premiums do not exist ma find that they have a competitive advantage selling packaged milk i a market where substantial premiums exist. Such situations creat disorderly marketing conditions and may result in the loss of Class markets to some producers.

In some cases, negotiated premiums are not marketwide. This tend to destroy one of the basic purposes of milk orders, that of uniformity of prices to handlers. Handlers who are able to buy mil from nonmember sources or from cooperatives who are no participating in the "super pool" obviously have a competitiv advantage. This creates disorder, a situation milk orders are designe to remedy.

The Advisory Committee recognizes that the concept of "or narketing," which "permeate[s] the statutory authorization for Federal narketing orders" "implies the establishment of relations between prod nd handlers which facilitate fair, but not disruptive, competition an producers and handlers" (Advisory Comm. Report at 4-5).

The Advisory Committee agrees with the Nourse Committee that n objectives of the Act are (i) "[t]o promote orderly marketing conditions, "[t]o assure consumers that they will have access to adequate and depen supplies of . . . milk from the sources best suited . . . economically to s these demands," and (iii) "[t]o secure equitable treatment of all par producers [and] dealers [handlers], . . . not only within each local or reg market but throughout the system" (Advisory Comm. Report at

Although the Advisory Committee is not as condemnatory of over-order premiums as the Nourse Committee, the Advisory Committee expresses concern that "negotiated premiums" that are "not marketwide" tend "to destroy one of the basic purposes of milk orders, that of uniformity of prices to handlers" (Advisory Comm. Report at 42).

A more recent report as to the Federal milk marketing order program was published the year before the Secretary's final decision at issue here. The report was in response to a congressional mandate in § 107 of the Agriculture and Food Act of 1981 to submit to Congress a dairy program operation report "describing the strengths and weaknesses of existing Federal programs, and the consequences of possible new programs, for controlling or minimizing surpluses of fluid milk and the products thereof" (95 Stat. 1213, 1220 (1981); 7 U.S.C. § 1446c-1 (note)). The study was conducted by a team of research economists in USDA's Economic Research Service and from two universities. The team of research economists was also assisted by a number of government and university advisors.[22]

The research economists concluded that in many milk orders, location adjustments "have grown seriously out-of-date." They concluded that changes are needed "to take into account not only changes in hauling costs, but also changes in the location of production, processing plants, and milk movements." The research economists state (Economic Research Service, U.S. Dep't of Agric., *Review of Existing and Alternative Federal Dairy Programs* 76 (Staff Report No. AGES840121) (Jan. 1984) (referred to as ERS Report to Congress)):

> <u>Changes in Intra-Order Transportation Allowances</u>
>
> Milk prices charged to handlers and blend prices paid to producers within orders are based upon zones centered on the primary fluid market in each order. In many orders, the zone boundaries and the hauling differentials between zones have grown seriously out-of-date. In Chicago, for example, problems exist in getting milk to move to fluid plants in the city and its northern suburbs. Realignment of zones and increased zone differentials might help this movement. Intra-order location differentials must be consistent with inter- order differentials to avoid stimulating inefficient milk shipments near the boundaries of orders. This suggests that a mechanism be developed for regular updating of location differentials within orders and between orders. Changes need to take into account not only changes in hauling

[22]The team of research economists consisted of: Richard Heifner, ERS, team l Kenneth Baum, ERS; Richard Fallert, ERS; Edward Jesse, ERS; Howard Leathers, Ur of Wisconsin; James Miller, ERS; Andrew Novakovic, Cornell University; Larry Salath and Felix Spinelli, ERS. Serving as advisors to the team were Joel Blum, Agri Marketing Service; William Dobson, Purdue University; Carol Harvey, Foreign Agric Service; Mary Kenney, Agricultural Marketing Service; Alden Manchester, ERS; Charles Agricultural Stabilization and Conservation Service; Tom Stafford, Agricultural Cooper Service; and John Witzig, Statistical Reporting Service.

costs, but also changes in the location of production, processing plants and milk movements.

As shown below (§ VI(B)), the Secretary's decision is entirely consis with, and strongly supported by, the views of the leading experts in the n in the field of dairy marketing, quoted in this subsection. It is in the ligl these views by the leading dairy experts that the Secretary's final decisio issue here should be evaluated.

B. The Secretary's Findings and Conclusions, that the 18¢ Incr in the Zone 8 Location Adjustment Is Appropriate to Estal Equity Among Producers, Establish Equity Among Hand Eliminate Disorderly Marketing Conditions, and Assure Adequate Supply of Milk for Zone 8, Are Supported Uncontradicted Evidence and Are Consistent with the View the Leading Agricultural Economists Who Are Experts in the I of Dairy Marketing.

Although the ALJ determined, and petitioners contend, that Secretary's findings of fact are not supported by the record, a careful ana of their views shows that they are not actually challenging the basic fact orth in the Secretary's decision but, rather, they are differing with Secretary's inferences or conclusions drawn from uncontradicted evide Neither petitioners nor the ALJ challenges the basic facts that support Secretary's inferences and conclusions.

Although the Secretary's findings are discussed under four categorie this subsection, (i) equity among producers, (ii) equity among handlers, disorderly marketing conditions, and (iv) an adequate supply of milk for Z 8, a careful analysis of these four categories reveals that all four are me different aspects of the single common theme stated in § III, *supra*, *viz.*, the producers providing the economic service of transporting milk to extremely deficit Zone 8 should be compensated for providing that econo service of benefit to the handlers in Zone 8.

1. Uncontradicted Evidence Supports the Secretary's Find and Conclusions that the 18¢ Increase in the Zone 8 Loca Adjustment Is Appropriate to Establish Equity Am Producers. These Findings and Conclusions Are Consis with the Secretary's 1984 Partial Final Decision.

a. Uncontradicted Evidence Supports the Secretary's I Findings and Conclusions that the Increase in the Zor Location Adjustment Is Appropriate to Establish Eq Among Producers.

The Secretary found and concluded that an 18¢ increase in Zone location adjustment is appropriate to establish equity among producers (particularly Findings 5(d), (i), (j), (l), (m), (r), (w), (x), (aa), (cc), (dd),

(kk), (qq)).[23] The Secretary's decision explains that the *possibility* for inequity among producers arises from the fact that the location adjustment then in effect did not reflect the current cost of hauling milk, and that the problem is a matter of degree, depending on the amount and distance of milk to be moved, and the transportation rate. The Secretary's decision states (Finding 5(w)):

> It is obvious that the current alignment of prices among Zones 1, 8, and 9 at the rate of 1.5 cents per hundredweight per 10 miles does not reflect the current cost of hauling milk. No testimony or evidence presented by any interested party disputed this fact. . . .
>
> Additional transportation costs that are not reflected in order location adjustments must be either paid for by the handler receiving the milk or subsidized through a net reduction in returns to producers who supply such plants. Either option can result in inequities among market participants if there is a disproportionate application of the additional costs. The problem is, of course, a matter of degree, which depends on how much milk must be moved, the distance involved, and the transportation rate.

The facts determining the "degree" of the problem are discussed in § III, *supra*, in which it is shown that substantial quantities of milk (almost 90% of Zone 8's needs) must be shipped long distances (usually more than 251 miles), with the order's 36¢ location adjustment providing transportation costs of only 1.5¢ per cwt per 10 miles, while a conservative estimate of actua transportation costs was twice that amount (3¢ per cwt per 10 miles). (Ever if over-order premiums are considered, since May of 1983, the *additiona* amount collected by AMPI from Zone 8 handlers over the amount collectec from handlers in the base zone (Zone 1), for the *additional transportatior service* provided, was only the order's 36¢ per cwt location adjustment computed at 1.5¢ per cwt.) Those vital facts are undisputed!

The Secretary then looked to see who was providing the (unprofitable, but necessary) economic service of benefit to Zone 8 handlers of transporting milk to them. He found that in the heavy milk production area northeast of Dallas, from which much of Zone 8's milk was transported (Findings 5(x), (hh), (ii)), only AMPI cooperative members were shipping milk to Houstor notwithstanding the fact that there was "a large number of nonmembe producers located in the heavy northeast production area" (Finding 5(x)) Those facts are undisputed!

It is on the basis of those undisputed facts that the Secretary drew the inference (the only one that logically can be drawn) that AMPI producers "must be subsidizing the additional transportation cost incurred in supplying Houston handlers," resulting in "inequities among producers in the heavy

[23]All of these findings (and others) are particularly relevant as to this issue, but, in view of the length of this decision, not all are discussed here.

northeast producing counties." The Secretary's decision states (Finding

> AMPI is the largest supplier of milk to handlers located throughc the marketing area and represents about two-thirds of the produc who supply the market. AMPI also markets the milk of Mid-A producers through arrangements between the two cooperatives. AM establishes prices to buying handlers in excess of Federal ord minimum Class I prices. These over-order prices cover a variety services provided to handlers, including the cost of hauling milk frc where it is produced to where it is needed for fluid use.
>
> Record evidence established that the over-order charges vari over time and were also subject to various competitive credits frc such prices and that hauling surcharges of varying amounts were al established. For most of the 1981 through 1982 period, the end res of the announced prices was that Class I prices in Houston were abo 72 cents per hundredweight higher than in Dallas. This would indica that such over-order prices represented differences in the locati value of milk on the basis of a more current transportation rate. Sin May of 1983, however, the over-order price structure was modified that the difference in prices between Dallas and Houston reflected or the 36-cent price difference that applies under the order.
>
> Since the order location adjustment does not cover the cost hauling milk to Houston, AMPI producers must be subsidizing tl additional transportation cost incurred in supplying Houston handlc under the pricing structure established in May 1983. The subsidizati of transportation costs results in a lower blend price to AM producers relative to those producers who do not incur the addition transportation costs that result from supplying distantly located defi southern zones of the marketing area. Substantial quantities of mi are shipped to Zones 8 and 9 from the heavy milk producing regio located northeast and southwest of Dallas. Record eviden established that there are a large number of nonmember produce located in the heavy northeast production area but that there is ı nonmember milk shipped from there to Houston. Consequently, it AMPI producers who bear the burden of shipping milk to Housto and as a result there are inequities among producers in the hea northeast milk producing [counties].

Elsewhere in his decision, the Secretary also makes it clear th letermination of inequity among producers is actually an inference fro oregoing undisputed facts. He states (Finding 5(dd) (emphasis added

> The record establishes the existence of various over-order pric as well as changes in the over-order pricing structure over tim Although exceptors contend that they paid the full hauling cost, aı thus there could be no producer subsidy, the record establishes th the same premium, including the 19-cent hauling surcharge, appli to all handlers. Therefore, the net difference in the charges betwe

> Dallas-area and Houston-area plants was 36 cents per hundredweight [i.e., the amount of Zone 8's location adjustment]. Also, AMPI testified that virtually all of the over- order charge was absorbed in the cost of moving milk from where it is produced to where it is needed. Since 36 cents does not cover the cost, *logically*, AMPI producers *must be* subsidizing the cost of hauling milk to Zone 8 plants and their returns are *therefore* lower than the returns to other producers located in the heavy northeast production area who do not incur the cost of shipping milk to Houston.

The Secretary's statement, just quoted, that AMPI members' returns are lower than other producers' returns, is not based on a comparison of actual pay prices of nonmembers and AMPI members, but, rather, is an inference, *based on this particular aspect of AMPI's operations*, which follows logically and certainly from the undisputed facts referred to above.

Furthermore, as the Secretary explains, a comparison of actual pay prices would be irrelevant because AMPI is engaged in a wide variety of activities in other marketing areas, ranging from Texas to Kansas and New Mexico to Alabama. All of such operations are reflected in the pay prices of AMPI's Texas producers.[24] Hence the Secretary's findings and conclusions as to inequity among producers are based on the logical inference from the undisputed facts set forth above. As the Secretary explains (Finding 5(x) (emphasis added)):

> There is no detailed information in the record that establishes precisely the extent to which AMPI pay prices are less than prices to other producers who supply the Texas market. However, testimony does indicate that AMPI pay prices have been slightly below the order blend price while pay prices to nonmember producers who supply Zone 1 plants have been in excess of the order blend price. However, even if additional information on AMPI pay prices were included in the record, it would not be known to what extent the Texas market AMPI pay prices are affected by the total marketing operations of AMPI, which extends well beyond the Texas market and includes all of the Federal order markets covered by AMPI's Southern Region. The AMPI Southern Region includes all of the area from Texas to Kansas and New Mexico to Alabama. However, this information is not necessary. Since substantial quantities of AMPI milk are shipped to deficit southern areas and additional transportation costs are not recovered under the current pricing structure, returns to AMPI *logically must be* reduced relative to other producers who do not incur the additional transportation costs that are not reflected in the order.

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[24] The Act expressly authorizes cooperatives to re-blend their proceeds from "all of [their] sales in all markets in all classifications" (7 U.S.C. § 608c(5)(F)).

Petitioners (and to a lesser extent, the ALJ) repeatedly (and erroneously) indicate that the Secretary's findings as to inequity among producers are based on differences in actual pay prices received by nonmembers and AMPI's members (e.g., Answer of Petitioners to Respondent's Appeal Petition at 33-38, 41-43; Initial Decision at 18; and see Initial Decision at 29). That erroneous argument so completely distorts the inequity-among-producers issue that some redundancy (two paragraphs) is appropriate. As shown above in this subsection, the Secretary did not determine producer inequity by comparing pay prices. Although the Secretary observed that "AMPI pay prices have been slightly below the order blend price while pay prices to nonmember producers who supply Zone 1 plants have been in excess of the order blend price" (Finding 5(x)), he explained that "[t]here is no detailed information in the record that establishes precisely the extent to which AMPI pay prices are less than the prices to other producers who supply the Texas market," and that "even if additional information in AMPI pay prices were included in the record," that evidence would not be significant because "it would not be known to what extent the Texas market AMPI pay prices are affected by the total marketing operations of AMPI, which extends well beyond the Texas market and includes all of the Federal order markets covered by AMPI's Southern Region" (Finding 5(x)). The extent to which AMPI Texas order pay prices are affected by AMPI's far-flung activities, which extend well beyond the Texas marketing area, is also explained in the Secretary's Partial Final Decision, discussed below in § VI(B)(1)(b).

In short, the Secretary concluded that AMPI returns were lower *because* of the inequity--not that there was inequity because the returns were lower. That is, the Secretary stated that AMPI producers "*must be subsidizing* the cost of hauling milk to Zone 8 plants and their returns *are therefore lower* than those of producers who do not subsidize the transportation costs to Houston (Finding 5(dd) (emphasis added)).

Petitioners argue that AMPI was, in fact, recovering its additional transportation costs incurred in transporting milk to Houston through over-order premiums (Answer of Petitioners to Respondent's Appeal Petition at 34-36, 41-43, 45). That argument is unpersuasive for two reasons. In the first place, even if petitioner's argument were true, it would not prevent the Secretary from taking the action he took here.[25] The Secretary is not required, when setting the level of location adjustments, to concern himself with over-order premiums, which are subject to change without his control (based upon factors such as the supply-demand balance, the strength of the cooperative vis-a-vis the handlers, the number of cooperatives serving the area, and the ease of entry of milk from other areas). The Secretary has the right (if not the responsibility) to set order prices (class prices and location adjustments) that reflect the value of milk at the location of the plant to which it is delivered (§§ III(D), IV, VI(A), VI(B)(4)). Hence in determining

[25]At the most, it would be a (weak) ground for a remand to the Secretary to see if he would have taken the same action even if the evidence did not support his additional views as to the over-order premium situation. As I read the Secretary's decision, the over-order premium situation is of trifling importance compared to the Secretary's inference, based on the undisputed evidence recited above, that AMPI "must be" subsidizing the additional transportation costs incurred in supplying Houston handlers.

whether there is equity among producers, the Secretary can quite properly exclude over-order premiums from consideration.

In the second place, the undisputed evidence here shows that even when AMPI's over-order premiums are considered, since May of 1983, AMPI was not collecting any amount from Houston handlers, other than the order's 36¢ location adjustment, over the amount collected from Dallas handlers in Zone 1, the base zone. As the Secretary's decision explains, during most of 1981 and 1982, AMPI's over-order premiums resulted in actual Class I prices in Zone 8 (Houston) about 72¢ higher than in Zone 1 (Dallas) (Finding 5(x)). During that period, petitioners' argument would have been sound as to the facts (but still irrelevant). In fact, during that period, AMPI was collecting 18¢ more from Houston handlers (compared to what it was collecting from Dallas handlers) than under the Secretary's *increased* location adjustment (54¢) at issue here (72¢ - 54¢ = 18¢).

But since May of 1983, AMPI was collecting from Houston handlers, over the amount collected from Dallas handlers, only the order's 36¢ location adjustment (Findings 5(x), (z), (dd)). Hence since May of 1983, the additional amount collected by AMPI to reimburse AMPI for the additional expenses incurred in transporting milk to Houston was only 36¢ per cwt, which petitioners admit did not cover AMPI's transportation costs.

Petitioners further contend that at the time of the hearing, 19¢ of AMPI's 87¢ over-order premium was specifically earmarked as a "hauling surcharge," and when that is added to the 36¢ location adjustment, Houston handlers were already paying AMPI a penny more than the new 54¢ location adjustment (Answer of Petitioners to Respondent's Appeal Petition at 34-35). But that same 19¢ "hauling surcharge" was collected from Dallas handlers in Zone 1, the base zone. Hence it did not pay for 1¢ of the *additional* expense incurred by AMPI in transporting milk to Houston handlers. Notwithstanding the 19¢ "hauling surcharge," AMPI was still collecting only the order's 36¢ location adjustment for the additional expense of transporting milk to Houston handlers, which was considerably less than AMPI's actual transportation expenses for this *additional* service.

As the Secretary's decision explains, AMPI's "over-order prices cover a variety of services provided to handlers, including the cost of hauling milk from where it is produced to where it is needed for fluid use" (Finding 5(x)). Over-order premiums may be paid for "quality, size of shipment, bulk tank milk, etc." (Advisory Comm. Report at 35 (§ VI(A), *supra*)). Over-order premiums also cover AMPI's losses from manufacturing operations, which are of benefit to all handlers in Texas, since they balance the fluid market (see the Secretary's Partial Final Decision, quoted in the following subsection (49 Fed. Reg. 20,825, 20,827 (1984)).

Accordingly, if over-order premiums are to be considered in determining whether there is equity among producers in the heavy northeast production area, with respect to the *additional transportation expense* incurred by AMPI (but not by nonmembers) in transporting milk to Houston, it was certainly *a* reasonable approach (if not the *only* reasonable approach) to look only at the *difference* between the over-order premiums charged to Houston handlers and Dallas handlers. That difference is the *additional amount* AMPI was receiving

for the *additional service* provided to Houston handlers. Since May of 1[illegible] that difference was only the order's 36¢ location adjustment, wh[illegible] admittedly, was not enough to cover the additional expenses incurre[illegible] transporting milk to Houston.[26]

The ALJ states that the Secretary should have waited to see whe[illegible] AMPI's over-order premium structure, in effect since May of 1983 and at [illegible] time of the hearing, was "of a permanent nature." He states (Initial Deci[illegible] at 31):

> In concluding that AMPI failed to assess its Houston customers sufficient hauling charges, the decision principally focused upon the five months prior to the hearing, May-September, 1983, when AMPI charged all of its Texas customers the identical amount of 19 cents per hundredweight. However, from March 1982- April 1983, AMPI's hauling service charge to Houston customers had been 39 cents per hundredweight, or 20 cents more than the 19 cents charged all other Texas handlers. That 20 cents plus the 36 cents assessed by AMPI as a location adjustment on milk for distribution in Houston came to 2[illegible] cents per hundredweight more than the 54 cents per hundredweight location adjustment differential that the decision decided was needed to redress producer inequities. If "producer subsidization"[27] as shown by "over-order prices" was an actual criterion for the ordered price increase, then a convincing explanation should have been supplied to demonstrate that the five month reduction of the Houston hauling service charge was of a permanent nature.

I disagree for two reasons. First, nothing in the Act requires the Secre[illegible] to wait to see whether conditions change, before he takes appropriate ac[illegible] on the facts existing at the time of an order hearing. Such a dilatory pra[illegible] would not be sound administrative policy. The Secretary can (7 U.S.C[illegible] 608c(1), (17), (18)), and does, issue many amendments to milk orders.

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[26]The fact that the Secretary looked at the over-order premium situation is not incons[illegible] [illegible]th my first point that the Secretary is not required to concern himself with over-[illegible] [illegible]remiums in setting the level of location adjustments. Although he is not required to con[illegible] [illegible]ver-order premiums, he may, *if he chooses*, rationally consider them in deciding wheth[illegible] [illegible]xercise his permissive authority (see *Schepps*, § VII(F), *infra*, as to the permissive natu[illegible] [illegible]he authority) to issue a location adjustment fully compensating producers *under the [illegible]rovisions for the economic service rendered to handlers in transporting milk to a deficit are[illegible]*

[27]The ALJ states (Initial Decision at 30):

> The term "subsidization" [in the Secretary's decision (Finding 5(dd))] creates [illegible] false impression. All producer milk is sold "f.o.b. [rather, c.i.f.] the plant." Therefore hauling costs are a producer's legal responsibility.

> However, it is the ALJ's argument--not the Secretary's decision--that creates [illegible] false impression. It is the very fact that producer milk is sold c.i.f. the handler's plant and that hauling costs are, therefore, a producer's legal responsibility, that makes i[illegible] appropriate (if not mandatory) for the Secretary, who has the responsibility of settin[illegible] a fair (minimum) price required to be paid by the handler to the producer, to set th[illegible] price (including the location adjustment) at a level that adequately compensates o[illegible] rewards the producer for hauling the milk to the handler's distant plant, i.e., to pric[illegible] the milk according to its location value. That is the basic principle that led Congress to authorize location adjustments (see § III(D), *supra*).

acts, at times, on a few day's notice, with less than a month elapsing between the notice of hearing and the effective date of amendatory action. If conditions had changed, after the Secretary's action here, the Secretary could easily have amended the location adjustment once again.

Second, and more importantly, as stated above, the Secretary is under no duty to concern himself with over-order premiums. He has the right (if not the responsibility) to set class prices and location adjustments that fully reflect transportation costs. Nothing in the Act, logic or administrative practice dictates that he abdicate his responsibility, and let cooperatives handle this situation through over-order premiums. In addition, Congress emphatically expressed the view in the legislative history of the Food Security Act of 1985, amending § 8c(5((A) of the Agricultural Marketing Agreement Act of 1937, involved here, that over-order premiums have "caused instability that the Federal milk order program was designed to alleviate," and that the "manner in which to attract milk is through adjusted [order] prices"--not over-order premiums (§ IV, *supra*).

To (begin to) conclude this discussion as to inequity among producers, the Secretary determined that there were inequities among producers caused, to a large degree, by the "failure of the order pricing structure to reflect a sufficient amount of the current cost of hauling milk," and that it was appropriate for him, "under the authority of the Act, to review and rectify those marketing conditions (such as nonuniform returns to producers . . .) that result from a failure of the order to reflect an appropriate location value of milk" (Findings 5(aa), (cc)). The Secretary's decision states (Findings 5(aa), (cc)):

> The inequities among handlers and producers, to a large degree, are a result of the failure of the order pricing structure to reflect a sufficient amount of the current cost of hauling milk. The magnitude of the deficiency is amplified because of the substantial distances involved and the amounts of milk that must be moved to the major consumption centers in the South. . . .
>
> . . . .
>
> . . . The Houston area has experienced a significant increase in population and an increasing proportion of milk supplies from distant areas must be obtained to meet fluid milk needs. At the same time, transportation costs have increased to the point that the current Zone 8 location adjustment no longer represents a sufficient degree of the added service or cost involved in supplying milk to plants in such area. Although the record indicates that Zone 8 plants have obtained sufficient supplies of milk it also establishes that, because of higher transportation costs and various changes in the over-order pricing structure, inequities exist both among producers and handlers. . . . Certainly it is appropriate for the Secretary, under the authority of the Act, to review and rectify those marketing conditions (such as nonuniform returns to producers and costs to handlers) that result

from a failure of the order to reflect an appropriate location val milk.

In short, as explained near the beginning of this subsection, the Sec vital findings as to inequities among producers are, actually, inferenc undisputed evidence. The inequities result, in large part, from the fa the Zone 8 location adjustment to reflect an appropriate location v milk.

Even as to the (minor) over-order premium situation, the facts in dispute--only the proper method of allocating the over-order prem in dispute. The Secretary's conclusion, that in considering whether over- order premiums actually compensate AMPI for the additional c incurred in transporting milk to Houston handlers, you should look additional amount charged Houston handlers over handlers in the ba (Dallas), is at least a reasonable conclusion, if not the only rea conclusion, that can be drawn from the facts. Hence, even consider over-order premium situation, the same inequities among produce manifest from the undisputed facts.

The Secretary was properly concerned about such inequities producers (§ VI(A), *supra*). Any argument to the contrary is in confli the views of the leading agricultural economists who are experts in th of dairy marketing (*id.*). Moreover, Congress expressed concern f identical inequitable situation in the legislative history of the Food S Act of 1985, amending § 8c(5)(A) involved here. The House Report sta IV, *supra*):

> The proposed changes in the marketing order minimums will mo fully address the cost of transferring milk from the surplus areas to t deficit areas which in turn will assist in providing a more uniform pri to handlers or uniform payments to producers. At the moment, the are three major problems with respect to the operation of the Feder order systems: (1) minimum Federal order Class I prices [includi location adjustments] are not adequate to attract the necessary supp to meet the Class I needs in deficit areas; . . . and (3) those produce who assume the responsibility of supplying the needs of the mark have to pay the cost of transporting supplemental milk, resulting producers not receiving uniform prices.

In this respect, it is important to recognize that we are not consid inequities among producers in order to see if there is specific authority i uniformity provisions of § 8c(5)(A) to deal with such a lack of uniformity rather, we are looking to see whether the Secretary acted in an arbitrar capricious manner when he looked at producer inequities in deciding wh to exercise his express statutory authority to adjust the uniform Class I p of milk paid by handlers based on "the locations at which delivery of such . . . is made to such handlers" (7 U.S.C. § 608c(5)(A)).

Finally, it should be noted that inequity among producers is important than inequity among handlers, since the Act is designed to be producers (and consumers), rather than handlers. As stated in *Blo Community Nutrition Institute*, 467 U.S. 340, 342, 346 (1984):

The "essential purpose [of this milk market order scheme is] to raise producer prices," S. Rep. No. 1011, 74th Cong., 1st Sess., 3 (1935), and thereby to ensure that the benefits and burdens of the milk market are fairly and proportionately shared by all dairy farmers. See *Nebbia v. New York*, 291 U.S. 502, 517-518 (1934).

. . . .

. . . The Act contemplates a cooperative venture among the Secretary, handlers, and producers the principal purposes of which are to raise the price of agricultural products and to establish an orderly system for marketing them.

Moreover, the Act is particularly designed to benefit cooperative associations. As stated in *In re Lamers Dairy, Inc.*, 36 Agric. Dec. 265, 286-89 (1977), *aff'd*, No. 77-C-173 (E.D. Wis. Sept. 28, 1977), *printed in* 36 Agric. Dec. 1642 (1977), *aff'd*, 607 F.2d 1007 (7th Cir. 1979) (unpublished), *cert. denied*, 444 U.S. 1077 (1980):

Moreover, the Supreme Court has expressly approved block votin by dairy cooperatives under the Act even if the effect of the Ord gives the cooperatives a monopoly of the market. Specifically, Court held in *United States v. Rock Royal Co-op.*, 307 U.S. 533, 5 560: 7/

7/ See, also, *H. P. Hood & Sons v. United States*, 307 U.S. 588, 599.

It is quite true that the League [*i.e.*, a cooperative] whicl itself cast two-thirds of the favorable votes was in a position to cast more than one-third of the total qualified vote agains the Order. This arises from the provision of the Act [7 U.S.C 608c(12)], authorizing cooperatives to express the approval o disapproval for all of their members or patrons. This is not a unreasonable provision, as the cooperative is the marketin agency of those for whom it votes. If the power is in th Congress to put the order in effect, the manner of demonstration of further approval is likewise under its cor These associations of producers of milk have a vital in the establishment of an efficient marketing syste adequately explains their interest in securing the adop order believed by them to be favorable for this ulterior motives of corporate aggrandizement sti activities, their efforts were not thereby rendered unlawful. If the Act and Order are otherwise valid, the fact that their effect would be to give cooperatives a monopoly of the market would

not violate the Sherman Act or justify the refusal of the injunction. [Footnotes omitted; emphasis supplied.]

The programs for the regulation of milk marketing under the Act are largely an extension and continuation of the work of cooperative marketing associations prior to this legislation. 8/

8/ See, *Economic Standards of Government Price Control*, Monograph No. 32 (76th Cong., 3rd Sess., Senate Committee Print for the Use of the Temporary National Economic Committee in the Investigation of Concentration of Economic Power), pp. 58-59; Black, *The Dairy Industry and the AAA* (The Brookings Institution, 1935), pp. 192-196; Bartlett, *Cooperation in Marketing Dairy Products*, pp. 188-210; *Agricultural Cooperation in the United States* (Farm Credit Administration, April 1947), p. 45 *et seq.*

It was recognized early in the administration of the Act that without a strong cooperative in a milk market "the cornerstone for a successful program is lacking." Report of the Associate Administrator of the Agricultural Adjustment Administration, in Charge of the Division of Marketing and Marketing Agreements, and the President of the Federal Surplus Commodities Corporation (1939), p. 31. "It would be impossible to have the type of regulatory program which exists today without strong co-operative organizations." *Id.* at p. 30. See, also, Black, *The Dairy Industry and the AAA* (The Brookings Institution, 1935); pp. 467-478; Nourse,[28] Davis, and Black, *Three Years of the Agricultural Adjustment Administration* (The Brookings Institution, 1937), pp. 267- 268.

The distinction under the Act between cooperatives and other handlers, and the encouragement to be given cooperatives under Federal Milk Orders, was recognized in *United States v. Rock Royal Co-op., supra*, 307 U.S. 533, 562-564, as follows:

> Different treatment has been accorded marketing cooperatives by state and federal legislation alike. Indeed the Secretary is charged by this Act to "accord such recognition and encouragement to producer-owned and producer-controlled cooperative associations as will be in harmony with the policy toward cooperative associations set forth in existing Acts of Congress, 9/

9/ Numerous acts of Congress deal with cooperatives differently from proprietary business enterprises, and enunciate the policy of aiding and encouraging the establishment, operation, and growth of marketing cooperatives. Some of the instances of the Congressional policy of special consideration for, and treatment of, cooperatives are in the Agricultural Marketing Act of June 15, 1929 (12 U.S.C. 1141, 1141j); the Clayton Act (15 U.S.C. 17); the Capper-Volstead Act (7 U.S.C. 291); the Robinson-Patman

[28] Dr. Nourse was chairman of the Nourse Committee, discussed in § VI(A).

Act of June 19, 1936 (15 U.S.C. 13b); the Commodity Exchange Act (7 U.S.C. 10a); and the Agricultural Fair Practices Act of 1967 (7 U.S.C. 2301 *et seq.*). See, also, Nourse,[29] *The Legal Status of Agricultural Cooperation*, pp. 241-266; and Hulbert, *Legal Phases of Co-operative Associations* (Farm Credit Administration, May 1942), pp. 307-322.

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and as will tend to promote efficient methods of marketing and distribution." [7 U.S.C. 610(b)(1)]. These agricultural cooperatives are the means by which farmers and stockmen enter into the processing and distribution of their crops and livestock. The distinctions between such cooperatives and business organizations have repeatedly been held to justify different treatment.

* * *

The producer cooperative seeks to return to its members the largest possible portion of the dollar necessarily spent by the consumer for the product with deductions only for modest distribution costs, without profit to the membership cooperative and with limited profit to the stock cooperative. It is organized by producers for their mutual benefit. For that reason, it may be assumed that it will seek to distribute the largest amounts to its patrons. [Footnotes omitted.]

Similarly, the favored position of producers under the Act (which includes, of course, cooperatives) was expressed in *In re Michaels Dairies, Inc.*, 33 Agr Dec 1663, 1709 (1974), affirmed *sub nom. Michaels Dairies v. Butz*, [No. 22-75] 34 Agr Dec 1319, 1320, 1323 (D.C. D.C. [Aug. 21, 1975]), affirmed, [546] F.2d [1043] (No. 75-2023, C.A. D.C., decided December 17, 1976), as follows:

Where there is a clash of interests between the handlers on the one side and the producers and consumers on the other, the statute provides a clear-cut basis for resolving the clash. Orders issued under the Act are "principally for the economic protection of producer and consumer" (*United States v. Mills*, 315 F.2d 829, 837 (C.A. 4), certiorari denied, 374 U.S. 832, 375 U.S. 819). The Act provides for the issuance of marketing Orders with or without handler approval (7 U.S.C. 608c(8) and (9)). In practice, almost no handler ever agrees to sign a milk marketing agreement, and all of the approximately 60 milk Orders were promulgated after the handlers refused to agree to the programs. It is not unusual for handlers such as

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[29] Dr. Nourse was chairman of the Nourse Committee, discussed in § VI(A).

petitioner to be unhappy with a program designed to regulate them for the benefit of producers and consumers.

One unfamiliar with milk marketing might wonder why AMPI would continue to transport milk to Houston when it was not recovering its transportation costs. The answer is that AMPI represents "a substantial majority of the dairy farmers who furnish milk to handlers located throughout the marketing area" (Finding 5(e)), so AMPI is concerned about the blend price returned to all producers under the order. If no producers transported milk to Zone 8, the blend price to all producers would be lower (as a result of a smaller Class I usage). A nonmember, concerned about his individual profit, would not have the same incentive as AMPI had to subsidize hauling costs, if necessary, in order to obtain a higher Class I usage benefiting all producers.

But irrespective of whether AMPI complained about the inequity involved here,[30] the Secretary had the statutory right (if not the duty) to correct the inequity.

b. The Secretary's 1985 Findings and Conclusions Are Not Inconsistent with Those Made in His 1984 Partial Final Decision.

On May 14, 1984, C. W. McMillan, Assistant Secretary, Marketing and Inspection Services, issued a Partial Final Decision denying a proposal to temporarily reduce (during the months of December 1983 and March through June 1984) the Class III price level for producer milk used to make butter, nonfat dry milk and cheddar cheese (49 Fed. Reg. 20,825, 20,825-31 (1984)). The Secretary's Partial Final Decision has no relevance to the issues here, but since the ALJ and petitioners erroneously claim that the Secretary's final decision at issue here is inconsistent with his findings in the Partial Final Decision, the Partial Final Decision must be considered.

The Partial Final Decision is based on the identical hearing record involved in the present case. It relates to AMPI's request for a reduction of 40¢ per cwt on producer milk used to manufacture butter, nonfat dry milk and cheddar cheese during December 1983, and March through June 1984. AMPI claimed that it performs a marketwide service clearing the market of surplus milk of benefit to all producers in the market, and that due to

[30]The proposal to increase the location adjustment did not originate with AMPI, and AMPI did not introduce evidence at the hearing as to this issue. However, when petitioners filed the § 8c(15)(A) petition initiating this proceeding, AMPI intervened to file a brief supporting the Department's position, but withdrew before the ALJ's decision was filed. After the ALJ decision, AMPI was again granted the right of limited intervention (and filed three additional briefs) pursuant to its motion stating (Motion filed Mar. 13, 1986):

> AMPI previously moved and was granted the right pursuant to 7 CFR § 900.57 to intervene in this proceeding. AMPI later withdrew its intervention and participation in the belief that its interests would be adequately represented by the Secretary of Agriculture and Intervenor Schepps Dairy, Inc. In light of the Administrative Law Judge's Decision and Order, however, AMPI submits that its intervention and continued participation in these proceedings is imperative in order that it may adequately protect and represent its interest.

unusually large surpluses expected during those months, AMPI would incur substantial losses, which should be borne by all producers through a lower blend price. AMPI claimed that it was operating its plants at levels above their maximum capacity, creating inefficiencies and increased costs.

Kraft, Inc., supported AMPI's proposal on a different ground, contending that there are regional cost differences caused by seasonal variability of milk available to manufacturing plants as between Texas and the Minnesota-Wisconsin area, and the difference in butterfat and solids-not-fat content of milk produced in Texas and milk originating in the Upper Midwest, which would justify a reduction of the Texas Class III price of about 32¢ per cwt.

Opponents testified that (i) butter, nonfat dry milk and cheese are traded in a national market, and, therefore, the Class III price should be the same in all orders, (ii) it would establish a harmful precedent to lower the Class III price in one order, (iii) a reduced Class III price would conflict with the dairy price support program, (iv) AMPI did not show losses on its total operations, and (v) any losses sustained by AMPI were for the benefit of handlers, and should be recovered through over-order premiums.

The Secretary denied AMPI's proposal for a temporary Class III price reduction because AMPI failed to prove its case, and the evidence presented by Kraft related to long-term problems that should not be dealt with on a temporary basis.

With respect to AMPI's failure to prove its case, the Secretary states (49 Fed. Reg. at 20,827):

> The record does not establish that AMPI is incurring extraordinary losses in operating its manufacturing plants or that it is unable to recover its manufacturing losses from within its total operations in supplying the Texas market or from its Southern Region marketing activities that extend beyond the Texas market, but which are, nevertheless, related to the disposition of Texas order surplus producer milk.

The Secretary explains that the "data presented by AMPI with respect to losses incurred at its two Texas order manufacturing plants represent a limited portion of AMPI's manufacturing and market clearing activities and also do not include the total manufacturing that is conducted at the two plants" (*id* Accordingly, "it is not at all certain that the losses presented with respect producer milk are representative of the total financial picture of the operatio of the two plants" (*id.*).

In addition to the uncertainty over AMPI's losses at these two plants AMPI diverted substantial amounts of producer milk to other plants, an "[t]here is no demonstration on the record of this proceeding to indicate t AMPI suffered any significant losses with respect to the diverted milk, eit in terms of manufacturing losses at its own nonpool plants or in terms excessive, unrecoverable transportation costs" (49 Fed. Reg. at 20,82 Accordingly, "the proposed price reduction would have applied to a significa quantity of milk for which there is no demonstrated loss on the record" (*id*

Moreover, since AMPI's operations extend well beyond the Texas ord

area, and returns to AMPI producers are based on its entire Southern it would not be appropriate to reduce returns to all Texas order proc the basis of claimed losses at two plants. The Secretary's decision st

> The marketing system of the Southern Region of AMPI ex well beyond the Texas order, as is indicated by the processing of order surplus milk at AMPI plants in Oklahoma and K Consequently, an examination of operating losses at the two manufacturing plants is too limited in scope to establish the exis of inequities in pay prices among groups of producers that warrant amendatory action to maintain orderly marketing condi It would not be appropriate to reduce returns to Texas producers on the basis of claimed losses at two manufacturing when the marketing system of AMPI generates returns to A members from the sale and processing of milk over a broad r that extends well beyond the Texas marketing area.

The Secretary also expresses the view that the "costs of pr balancing service *should* be recovered from the fluid milk handlers th directly from this balancing function," through over-order premi (emphasis added).[31] In this respect, it should be noted that, u situation with respect to location adjustments, the Act does not auth adjustments to the uniform price to compensate producers for bala supply-demand situation through surplus removal (manufacturing)

Although the Partial Final Decision has no relevance to the issu case, here, again, the ALJ and petitioners present bits and piec Partial Final Decision which they erroneously believe to be in conflict Secretary's final decision at issue here. However, the entire Part Decision must be read in order to place the bits and pieces relied ALJ and petitioners in proper context. The Secretary's findi conclusions set forth in the Partial Final Decision are as follows (49 20,825, 20,825-30 (1984)):

<u>FINDINGS AND CONCLUSIONS</u>

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[31]However, contrary to the ALJ's view, the Partial Final Decision does not say t had the *ability* to adjust its over-order premiums on fluid milk sales to recover balancing the market's fluid milk supply [the ALJ cites 49 Fed. Reg. 20,828 (198 Decision at 29) (emphasis added). The Partial Final Decision recognizes (in paragraph stating that the balancing service "should" be recovered through o premiums) that AMPI "reduced its over order charges to fluid milk handlers bec existence of excessive supplies of milk" (49 Fed. Reg. 20,828 (1984)), i.e., because o bargaining power due to the supply- demand situation. The Partial Final Decis however, that manufacturing losses in a particular month "need not be recovered i month," but could be recovered later (*id.*). Accordingly, the ALJ's view is b misreading of the Secretary's statements where he states (Initial Decision at 29):

> Also, the underlying premise that the Texas Order needed amendment because was unable to raise its over-order charges to recover its transportation costs, do square with the earlier finding that AMPI had the ability to adjust its over premiums on fluid milk sales to recover the cost of balancing the market's flui supply.

The following findings and conclusions on the material issues are based on evidence presented at the hearing and the record thereof:

1. The Class III price level for producer milk used in butter, nonfat dry milk and cheddar cheese for December 1983 and March through June 1984. A temporary price reduction on producer milk used to make butter, nonfat dry milk and cheddar cheese should not be adopted for the months of December 1983, and March through June 1984. Presently, the price for all producer milk in Class III uses, including butter, nonfat dry milk and cheddar cheese, is the basic formula price for the month. It represents the average of prices paid during the month for manufacturing grade milk in Minnesota and Wisconsin. The evidence included in this record does not support a change in the Class III price.

Associated Milk Producers, Inc. (AMPI), a cooperative association which represents a substantial majority of the dairy farmers who furnish milk marketed under the Texas order, requested a reduction of 40 cents per hundredweight on producer milk used to manufacture butter, nonfat dry milk and cheddar cheese during December 1983, and March through June 1984. AMPI's proposal was virtually identical to a temporary provision of the Texas order which was effective April 28 through June 1983. Land O'Lakes, Inc. (LOL) also proposed a reduction in the price of milk used to produce these products. However, LOL did not appear at the hearing and later in brief abandoned their proposal and opposed the change requested by AMPI.

A witness for AMPI stated that the market conditions which prompted a previous temporary price reduction have persisted and will be present during December 1983 and March through June 1984. Evidence was presented to show that producers associated with the Texas market have continued to increase production above year earlier levels while fluid sales in the market have declined. The spokesman indicated that December is traditionally a month when Class I sales are low because of school closings and reduced sales during the holiday period. Also, the months of March through June are the months when production is seasonally high and substantial amounts of milk must be moved to manufacturing plants. The witness asserted that the effect of a supply-demand imbalance in the market will result in unusually large quantities of milk not needed for the fluid market that must be manufactured into storable dairy products during December 1983 and March through June 1984.

The witness stated that AMPI clears the market of milk supplies in excess of the fluid needs of the entire Texas market. He testified that AMPI, by full supply, partial supply, and spot shipments, supplies almost all distributing plants on the market. In addition the witness stated that since early 1983, the amount of surplus milk handled by

AMPI has increased substantially. The witness claimed that marketwide increase in milk production combined with a slight dec in Class I sales caused AMPI to handle almost 100 million pou more of Order 126 surplus milk during March through June 1983 t for the same period in 1982, an increase of 44 percent.

The AMPI witness also presented evidence designed to show the cooperative loses money on its operations that serve to clear market of abnormal excess milk supplies. The witness stated AMPI operates plants at Muenster and Sulfur Springs, Texas, wh most of the producer milk not needed by the fluid market is proce into butter, nonfat dry milk and cheddar cheese. The Muenster p was said to produce barrel cheddar cheese and have a capacit process 30 million pounds of milk each month. The witness stated the Sulfur Springs plant produced butter and nonfat dry milk and co handle about 18 million pounds of producer milk per month. AMPI spokesman introduced data from the financial records of plants as a way of showing that both plants had lost money on processing of surplus producer milk. The losses at Muenster on a hundredweight basis ranged from 74 cents for the year 1981 to cents for January through April 1983. The Sulfur Springs plant h loss of 82 cents per hundredweight in 1981 and a loss of 74 cents hundredweight for January through April 1983.

The witness claimed that the current losses at AMPI's manufacturing plants were the result of attempting to process m milk in the plants than they were designed to accommodate. March through June 1983 receipts at the two plants averaged aln 53 million pounds per month, or more than 10 percent above the ra maximum capacity. The witness indicated that the operation of plants at levels above their maximum capacity creates inefficiencies increased costs.

AMPI's witness testified that the Class III price should be redu during December 1983 and March through June 1984, as a mean assuring that all producers on the market share more equitably in cost of handling unusually large surplus milk supplies during th months. AMPI claims that it handles much more than proportionate share of the market's Class III milk. AMPI also ass that it incurs substantial losses in its surplus milk operations. Si these losses are incurred as a result of actions that benefit producers in the market (the disposition of milk in excess of the f needs of the market) AMPI believes that all producers should sh the costs of these services through a slightly reduced uniform pric

A representative of Kraft, Inc. presented testimony suppor AMPI's proposal to temporarily reduce the Class III price. Howe the Kraft witness based his support on regional cost differences manufacturing plants rather than the rationale put forward by AM He stated that the regional cost differences were caused by

seasonal variability of milk available to manufacturing plants as between Texas and the Minnesota-Wisconsin area, and the quantifiable difference in butterfat and solids-not- fat content of milk produced in Texas and milk originating in the Upper Midwest, which results in a higher manufactured product yield per hundredweight for plants receiving milk from midwestern farms.

Kraft's witness stated that the company operates several cheese plants throughout the United States including a plant at Bentonville, Arkansas, which is a pool supply plant on the Southwest Plains milk order and which occasionally receives milk associated with the Texas market. Kraft does not operate any plants regulated by the Texas order. The witness presented evidence from Kraft's own records and from U.S. Department of Agriculture statistics to show that manufacturing plants in the Southwest face a more severe seasonal variation in supply than do similar plants in the Midwest. As a result, the witness claimed that plants in the Southwest cannot operate on a year-round basis at a level of capacity that allows them to achieve as great a level of efficiency as similar plants in the Minnesota-Wisconsin area. The witness stated that Kraft's experience indicates that this seasonal variability of supply factor makes the cost of operating a cheese plant in the Southwest 15.7 cents per hundredweight greater than the cost of operating a plant in the Upper Midwest.

The Kraft witness also presented evidence on the regional difference in the butterfat and solids-not-fat content of milk. Again the witness presented Federal order statistics and data from Kraft's own records to show that milk produced in the North Central region has higher butterfat and solids-not-fat content than milk produced in the Southwest. The witness also explained that these components affect the amount of butter, nonfat dry milk, or cheese that can be produced from a specific quantity of milk. The higher the butterfat and solids-not-fat, the greater the product yield. Thus, the witness concluded that manufacturing plants in the Southwest experience a lower product yield per hundredweight of milk than similar plants in Wisconsin. This yield difference, the witness contended, results in a cost difference of 16.7 cents per hundredweight between plants in the Midwest and those in the Southwest even when the butterfat differential is taken into consideration.

The Kraft spokesman stated that regional differences in manufacturing costs that result from the seasonality of milk available for manufacturing and regional differences in product yield should be reflected in the Class III prices of Federal milk orders. The witness concluded that these factors would justify a reduction of the Texas Class III price of about 32 cents per hundredweight.

A witness for Mid-America Dairymen, Inc. (Mid-Am), supported the AMPI proposal. The witness stated that AMPI had demonstrated that the costs associated with clearing surplus milk supplies in the Texas market more than justify a price reduction of 40 cents per hundredweight. Also, the Mid-Am official indicated that the price reduction would have little effect on the national market for butter, nonfat dry milk and cheddar cheese, and was not aware of any instance when AMPI had undercut the national price on these items while the previous price reduction was in effect during May and June 1983. In addition, the witness expressed agreement with the seasonality and yield theories put forward by Kraft to support the price reduction.

Seven individuals testified in opposition to the AMPI proposal. These persons represented individual producers, producer cooperative associations, proprietary dairy firms and the Wisconsin Department of Agriculture, Trade and Consumer Protection. These witnesses based their opposition on a variety of reasons. Since some opponents presented similar arguments, the points discussed by all seven witnesses are presented below in summary form.

Numerous opponents testified that butter, nonfat dry milk and cheese are traded in a national market. Therefore, the price assigned to milk used in those products should be the same in all Federal orders. Some opponents stated that the current basic formula price based on the Minnesota-Wisconsin price series should continue as the Class III price in all Federal milk orders. Other witnesses testified that they would not object to a change in the Class III price as long as the change was adopted for all Federal orders and based on national rather than local factors.

Several witnesses expressed concern that a Class III price reduction in Texas would give AMPI a way to sell butter, nonfat dry milk and cheddar cheese at a price lower than the national market price and thereby expand its market share. Witnesses from Wisconsin expressed a fear that Wisconsin cheese plants would lose sales to AMPI because the price cut would give AMPI the opportunity to underbid these organizations for commercial markets. Although these witnesses were concerned that adoption of the AMPI proposal would have a negative impact on handlers and producers in other parts of the country, the real concern seemed to be the precedential value the proposal might have. The witnesses representing handlers and producers located in Wisconsin were particularly concerned that adoption of lower Class III prices in Texas and various other orders would harm the competitive position of Wisconsin handlers and ultimately reduce the income of Wisconsin dairy farmers.

Three witnesses stated that a reduction of the Class III price in Texas would conflict with the goal of the dairy price support program. The witnesses said that the support program was designed to support the market for manufactured dairy products so that dairy farmers

would receive a specified price for their milk. The witnesses pointed out that the M-W price series has been below the support price for some months. In addition, they pointed out that a 40-cent price reduction would increase the current gap between the support price and the price farmers receive for milk used to produce butter, powder and cheese. Other witnesses said they opposed [any] order amendment that would lower the price received by dairy farmers at a time when the cost of production is increasing.

Opponents also contended that the Class III price reduction should not be adopted because AMPI did not produce evidence on the record that it lost money for its total operations. They claimed that AMPI should recover its manufacturing losses from the fluid market. These witnesses stated that since AMPI's manufacturing facilities functioned primarily as a means of balancing the fluid market, the cost of those balancing services should be borne by the handlers who benefit from the service. The witnesses suggested that AMPI's current over order premium should be sufficient to cover this manufacturing loss. In this regard, they stated that AMPI could solve its problem without help from the Federal milk order by charging handlers for these balancing services.

The major thrust of AMPI's testimony is that the Class III price should be reduced to offset losses incurred in operating its manufacturing plants beyond their rated capacity during periods of unusually large surplus milk supplies. The price reduction would result in all producers sharing a portion of the costs associated with operating the manufacturing plants that are necessary to clear the market of surplus production.

Record evidence establishes that AMPI handles a disproportionate share of the market's surplus production and that the cooperative performs a major balancing and surplus clearing function in the Texas market. Also, the record establishes that AMPI does experience some losses in processing surplus producer milk at its two manufacturing plants, although the magnitude of these losses cannot be measured with any degree of precision. The record does not establish that AMPI is incurring extraordinary losses in operating its manufacturing plants or that it is unable to recover its manufacturing losses from within its total operations in supplying the Texas market or from its Southern Region marketing activities that extend beyond the Texas market, but which are, nevertheless, related to the disposition of Texas order surplus producer milk.

The data presented by AMPI with respect to losses incurred a two Texas order manufacturing plants represent a limited portion AMPI's manufacturing and market clearing activities and also do not include the total manufacturing that is conducted at the two plar

The manufacturing losses are presented in terms of receipts of producer milk at the plants that are used to producer butter, nonfat dry milk and cheddar cheese. However, receipts of producer milk represent only between 85 and 90 percent of total receipts at the two plants. Also, the manufacturing of products other than butter, nonfat dry milk and cheddar cheese are excluded from the data. For example, profits generated from the sale of condensed milk and milk and cream blends from the Sulphur Springs plant are not included. Consequently, it is not at all certain that the losses presented with respect to producer milk are representative of the total financial picture of the operation of the two plants.

In addition to the above, the isolated losses with respect to handling of producer milk at the Muenster plant varied considerably during the first 6 months of 1983. The losses, as presented by AMPI, varied from about 7 cents per hundredweight for the January through April period to over 96 cents per hundredweight during May and June. According to the testimony, the minimal losses during the first 4 months of 1983 were a result of the Muenster plant being operated at or near its rated capacity during both the months of March and April. Also, the substantial losses presented for the Muenster plant during May and June were a direct result of the poor quality of the nonfat dry milk that was produced during such months. Although the plant was used for other than its intended purpose (producing nonfat dry milk powder rather than drying whey) to handle the volume of surplus, such losses cannot be anticipated to the same degree in the future. While it may be reasonable to assume that a heavy surplus of production may have to be processed during December 1983, the volume of surplus that may have to be processed during March through June of 1984 is a matter of speculation. While proponent expressed a degree of certainty with respect to the December surplus situation, the amount of surplus during March through June 1984 depends on what impact feed prices or programs to deal with the national surplus of milk would have on Texas milk production during such period. To the extent that the Muenster plant can be operated near its capacity, a price reduction of 40 cents per hundredweight would more than offset the losses claimed by AMPI.

In addition to the uncertainty over the actual losses at AMPI's two manufacturing plants, the volume of producer milk processed at the two plants does not represent all of the Texas order surplus producer milk handled by AMPI. For example, during the period of March-June 1983, approximately 211 million pounds of producer milk was received and processed at AM[P]I's two manufacturing plants. However, during the same period, approximately 106 million pounds of producer milk was diverted to nonpool plants for manufacturing. Most of the diversions were to two AMPI manufacturing plants located at Oklahoma City and Tulsa, Oklahoma, from AMPI producers located in Oklahoma. Only minimal diversions to manufacturing plants in Louisiana were necessary to clear the Texas order surplus production.

There is no demonstration on the record of this proceeding to indicate that AMPI suffered any significant losses with respect to the diverted milk, either in terms of manufacturing losses at its own nonpool plants or in terms of excessive, unrecoverable transportation costs. In contrast, the Deputy Assistant Secretary's decision of April 11, 1983 on a similar proposal to amend the Texas order was based on evidence of both significant operating losses and increased transportation costs.

The proposed 40-cent per hundredweight price reduction would have applied to all producer milk used to make butter, nonfat dry milk and cheddar cheese, not just the producer milk processed at the two AMPI Texas plants. For the March-June 1983 period, receipts of producer milk at the two manufacturing plants represented about 66.6 percent of the total volume of the surplus handled by AMPI that would have qualified for the proposed price reduction, while the remaining proportion was diverted. 1/ Consequently, the proposed price reduction would have applied to a significant quantity of milk for which there is no demonstrated loss on the record.

1/ The total receipts of producer milk at the two manufacturing plants, and the quantity of diverted producer milk did not represent the total surplus handled by AMPI during March through June 1983. A significant, but unspecified volume of producer milk was received at AMPI's manufacturing plant located at Hillsboro, Kansas, that was a pool plant under the Texas order during this period. The Hillsboro plant became pooled under the Southwest Plains order effective August 1, 1983. Since the Hillsboro plant is no longer pooled under the Texas order, the quantity of producer milk received at the Muenster and Sulphur Springs balancing plants plus the quantity of milk diverted to nonpool plants during the 1983 period is indicative of the quantity of producer milk that would be handled by AMPI under the Texas order during the period of the proposed price reduction.

The marketing system of the Southern Region of AMPI extends well beyond the Texas order, as is indicated by the processing of Texas order surplus milk at AMPI plants in Oklahoma and Kansas. Consequently, an examination of operating losses at the two Texas manufacturing plants is too limited in scope to establish the existence of inequities in pay prices among groups of producers that could warrant amendatory action to maintain orderly marketing conditions. It would not be appropriate to reduce returns to Texas order producers on the basis of claimed losses at two manufacturing plants when the marketing system of AMPI generates returns to AMPI members from the sale and processing of milk over a broad region that extends well beyond the Texas marketing area.

AMPI claims that its manufacturing plants provide a balancing service that benefits all market producers. The record establishes that the plants serve an important function in processing the weekly and seasonal supplies of milk that are in excess of fluid milk needs.

However, it has been a long established policy that the costs of providing a balancing service should be recovered from the fluid milk handlers that benefit directly from this balancing function. Exceptions to this policy have been recognized only in those rare cases when there was compelling proof of a real danger of disorderly marketing conditions caused by an acute surplus. Although over order pricing policies are not strictly within the scope of the federal marketing order program, the Secretary need not remain blind to their existence. In this regard, AMPI indicated that it reduced its over order charges to fluid milk handlers because of the existence of excessive supplies of milk. Even with a reduced over order charge, any manufacturing losses that may result in a particular month, need not be recovered in the same month. The record indicates that AMPI received an over order price on fluid sales throughout the year.

In conclusion, the record does not establish the extent to which manufacturing losses by AMPI actually exist or that certain, isolated losses on producer milk are resulting in a significant degree of inequity in pay prices among AMPI producers and other producers supplying the Texas market. Any substantial losses in AMPI's market clearing activities would be expected to result in pay prices to AMPI members that are significantly below the Texas order blend price. There is no evidence on the record to substantiate that such a situation exists as returns to AMPI producers have been equal to or only slightly below the order blend price. Also, there is no indication that any minimal manufacturing losses that result from balancing the fluid milk needs of the market should be offset in the form of a lower price, thus reducing returns to all producers, rather than being passed on to the fluid milk handlers that benefit directly from such balancing activities.

Four interested parties (AMPI, Kraft, Mid-America Dairymen, Inc., and Dairymen, Inc.) submitted exceptions to the above findings. Essentially, the exceptions claimed that the recommended decision was inconsistent with an April 1983 decision on a similar proposal, and that the recommended decision relies on speculation and data that are irrelevant to the Texas marketing area and ignores evidence that supports the AMPI proposal.

Although the recommended decision dealt with essentially the same issue as the April decision and the proponent presented similarly structured testimony in both proceedings, factual differences in the records of the two proceedings support the recommended decision when the record is viewed in its entirety.

The exceptors contend that the statistics presented by AMPI are sufficient evidence to justify adoption of the price reduction. They claim that the proponent performs services that benefit the whole market and that this requires that the organization be compensated for those services in the name of producer equity. For the reasons already indicated, it is concluded that the record does not support the

proposed price reduction. In this regard, AMPI's losses were not clearly demonstrated and directly related to its marketwide activities. This conclusion is based on factual differences between the record in this proceeding and the record on which the April 15, 1983 decision was based. The record of the earlier proceeding demonstrated losses from balancing activities. As stated previously, the testimony in this record indicates that the losses cited for the Muenster and Sulphur Springs plants do not represent a complete picture of the financial consequences of AMPI's market balancing activities. In months of trouble free operation, the Muenster plant operated at a near break-even point. Testimony in the record indicates that losses in other months were attributable to plant or equipment failures that were only peripherally related to the balancing activities of AMPI. The figures for the Sulphur Springs plant do not include AMPI's balancing activity involving separated cream and some other products. As a result, the statistics for these plants do not demonstrate losses that are related to activities that benefit the market that are large enough to cause a producer equity problem.

In addition the record indicates that about one-third of the Texas order surplus milk handled by AMPI is diverted to two AMPI plants in Oklahoma. The AMPI witness testified that the cooperative suffers no significant transportation loss on the marketing of the milk and also provided no information that would indicate that manufacturing losses were incurred at its Oklahoma plants. Contrary to exceptor's contention, this information pertaining to activities outside Texas is very relevant to this inquiry because it establishes that AMPI failed to demonstrate that it suffered any significant loss on one-third of the milk that would have been subject to the price reduction. Consequently, the proponent failed to demonstrate significant losses related to its market balancing activities. Adoption of the proposal under these circumstances would not have fostered producer equity.

Finally, exceptors contend that the recommended decision relies on speculation about future production trends that is not relevant and ignores record evidence dealing with producer pay prices that substantiates AMPI's claims that its producers carry a disproportionate burden of the total cost of balancing the milk supplies for the market. The trend in production is an important element with respect to this issue since it was contended that significant manufacturing losses would occur from the need to handle a temporary, excessive supply of milk in excess of manufacturing capacity. However, it should be pointed out that the speculation regarding projections of production were drawn from the testimony of AMPI's witness. In addition the pay price evidence alluded to by several exceptors was excluded from the record by the Administrative Law Judge and cannot be used to substantiate any position in this proceeding.

As previously stated, Kraft, Inc., supported AMPI's propc Kraft indicated that the proposed price reduction was justified on basis of lower product yields in southern markets and inefficiencic southern manufacturing plants because of greater seasonal voh fluctuations than are experienced in other areas of the country. the basis of yield and the seasonality of surplus milk available manufacturing, Kraft estimated that the value of producer milk a Southwest plants was about 32 cents per hundredweight less than value of milk at its plants located in the north central area of country.

The rationale presented by Kraft with respect to product yi does not appear to address the problem perceived by AMPI manufacturing losses that may result from handling a tempo excessive supply of milk. To the extent that product yields vary am different regions of the country on a consistent basis, there is implication that the problem perceived by Kraft is of more the temporary duration. However, higher manufacturing costs in south regions that result from lower yields may well be another cost of d business that should be recovered from the fluid sec Manufacturing facilities that are intended to be operated o permanent basis in low yield areas would appear to be economic justified to clear surplus milk supplies from the market. Thi because fluid use prices have been established at higher levels in tl higher cost of production regions for the purpose of generating adequate supply for fluid use and carrying the necessary reserve supply for such use. Consequently, over the long run, manufactu plant costs in these high cost of production and low yield areas ap to be more directly associated with serving the fluid milk needs market and, thus, may also represent costs of a nature that shoul recovered from the fluid sector.

Kraft also testified that the differences in the seasonal natur milk available for manufacturing results in higher manufacturing c at its Southwest plants than its North Central plants. Basically, K argues that manufacturing plants in the Southwest cannot be oper at as high a level of capacity on a year-round basis as plants in o areas of the country. Apparently, this occurs because southwes area plants ship a greater proportion of receipts to fluid milk ou and thus handle a smaller proportion of milk in manufacturing than in other areas of the country. Also, southwestern area pl have a lesser proportion of manufacturing grade milk availabl manufacture on a year-round basis than plants in other regions. result, Kraft contends that total manufacturing costs are greater ir Southwest because the cost of maintaining the necessary manufactu capacity to handle the flush production months must also be car over the relatively short production months of the year. Kraft cont that these greater costs at southwestern plants justify a lower Clas price in southwestern markets than in other markets.

The problem of maintaining necessary excess capacity during certain months is long term in nature and not related to the problem outlined by AMPI of costs associated with handling a surplus of production that is in excess of current manufacturing capacity. As stated previously with regard to the issue of regional yield differences, the cost of maintaining facilities to process milk that is surplus to the fluid needs of the market is more directly related to the fluid market and the revenues generated from fluid milk sales should be considered in any analysis of this issue. This record does not contain enough evidence to support the adoption of a change in the Class III price to offset regional cost differences.

Kraft and Dairymen, Inc. filed exceptions to the previous conclusions concerning the testimony and evidence presented by Kraft. Exceptors contend that the evidence presented by Kraft supports a lowering of the Class III price, as proposed by AMPI, in that such evidence demonstrates that other factors make it relatively more costly to operate manufacturing plants in Texas, and in other southwestern areas, than in other areas of the country.

Contrary to exceptors' claims, however, the evidence presented by Kraft does not support a temporary lowering of the Texas order Class III price. As the decision indicates, manufacturing cost differences that result from lower product yields or excess manufacturing capacity appear to be more directly associated with costs incurred in supplying the fluid market, particularly in high- cost-of-production, low-yield areas that are primarily fluid milk markets. Consequently, any analysis of relative manufacturing efficiencies among different regions of the country must also take into account the returns generated from fluid milk sales. In addition, the issue raised by Kraft cannot be addressed in the context of excessive manufacturing costs that may result from the need to handle a temporary excessive supply of milk.[32] Furthermore, consideration of the long term manufacturing efficiency issue has implications to the level of Class III pricing throughout the Federal order system and the national market for manufactured dairy products. Thus, it is preferable that the issue not be addressed on the basis of a record that is limited to a proposed temporary reduction of the Class III price level to deal with a temporary situation in one market.

[32] A new method of dealing with a temporary surplus milk situation in the Southeast and Middle Atlantic areas during May and June 1982 and April and June 1983 was held invalid in *Smyser v. Block*, 760 F.2d 514, 517-23 (3d Cir. 1985). The Secretary gave handlers in those areas a "transportation credit" against their pool obligations for the cost of shipping surplus milk outside of designated geographic areas. However, those provisions were not authorized by § 8c(7)(D) of the Act (7 U.S.C. § 608c(7)(D)), which authorizes provisions "[i]ncidental to, and not inconsistent with, the terms and conditions specified in subsections (5) and (7) of this section and necessary to effectuate the other provisions of such order."

One of the conclusory paragraphs of the Secretary's Partial Final Deci which is the basis for misstatements and erroneous arguments by the AL petitioners (Initial Decision at 17-19, 28-29; Answer of Petitione Respondent's Appeal Petition at 2, 24-25, 41), states (49 Fed. Reg. at 20 (the sentences are numbered for the purposes of analysis):

> [1] In conclusion, the record does not establish the extent to whic manufacturing losses by AMPI actually exist or that certain, isolate losses on producer milk are resulting in a significant degree of inequit in pay prices among AMPI producers and other producers supplyin the Texas market. [2] Any substantial losses in AMPI's mark clearing activities would be expected to result in pay prices to AMF members that are significantly below the Texas order blend price. [3 There is no evidence on the record to substantiate that such a situatio exists as returns to AMPI producers have been equal to or only slightl below the order blend price. [4] Also, there is no indication that an minimal manufacturing losses that result from balancing the fluid mil needs of the market should be offset in the form of a lower price, thu reducing returns to all producers, rather than being passed on to th fluid milk handlers that benefit directly from such balancing activitie

The first sentence of the paragraph just quoted is the key sentence summarizing all of the many facts and circumstances involved in AMPI failure to prove its case.

The second sentence merely expresses the view that any *substantial* l in AMPI's *market clearing activities* would be *expected* to result in pay p to AMPI members that are *significantly* below the Texas order blend p That is a sound view, since market-clearing activities involve such large manufacturing operations and such tremendous volumes of milk that it v be natural to expect substantial losses in that activity, reducing AMPI' prices *significantly* below the Texas order blend price. There is nothing i record to support a similar view that AMPI's failure to recover transport costs in transporting milk to Houston would be expected to reduce AN pay prices to a level *significantly* below the Texas order blend price.

The third sentence states that there "is no evidence on the reco substantiate that such a situation exists [i.e., that AMPI pay price *significantly* below the Texas order blend price] as returns to AMPI prod have been equal to or only slightly below the order blend price." T extent that the third sentence states that "returns to AMPI producers been equal to or only slightly below the order blend price," that is en consistent with the Secretary's final decision at issue here, in which he s (Finding 5(x)):

> There is no detailed information in the record that establishe precisely the extent to which AMPI pay prices are less than prices t other producers who supply the Texas market. However, testimor does indicate that AMPI pay prices have been slightly below the ord blend price while pay prices to nonmember producers who supp Zone 1 plants have been in excess of the order blend price.

Hence there is not the remotest inconsistency in the Secretary's findings as to AMPI's pay prices vis-a-vis the Texas order blend price in the two decisions.

Moreover, the difference between AMPI's pay prices and the Texas order blend price is not relied upon as a basis for the Secretary's action or conclusions in either decision. The bases for the Secretary's action in the Partial Final Decision are that AMPI failed to prove its case as to manufacturing losses, and the case proved by Kraft relates to long-term circumstances that should not be considered on a temporary basis. The bases for the Secretary's conclusion in the decision at issue here as to inequity among producers are the undisputed facts that AMPI, but not nonmember producers, is transporting milk from the heavy northeast production area, and the transportation costs exceed the *additional amount* received by AMPI for the *additional transportation* service provided, giving rise to the inference that AMPI returns logically must be reduced relative to other producers who do not incur the additional transportation costs (see § VI(B)(1)(a)). The Secretary states in his final decision at issue here, immediately following the two sentences quoted in the preceding paragraph (Finding 5(x)):

> However, even if additional information on AMPI pay prices were included in the record, it would not be known to what extent the Texas market AMPI pay prices are affected by the total marketing operations of AMPI, which extends well beyond the Texas market and includes all of the Federal order markets covered by AMPI's Southern Region. The AMPI Southern Region includes all of the area from Texas to Kansas and New Mexico to Alabama. However, this information is not necessary. Since substantial quantities of AMPI milk are shipped to deficit southern areas and additional transportation costs are not recovered under the current pricing structure, returns to AMPI logically must be reduced relative to other producers who do not incur the additional transportation costs that are not reflected in the order.

To summarize, there is no inconsistency between the Partial Final Decision, in which the Secretary found no inequity among producers resulting from AMPI's alleged, but not proven, manufacturing losses, and the final decision at issue here, in which the Secretary found inequity among producers resulting from AMPI's subsidization of transportation costs to Houston. The Secretary inferred in his final decision at issue here that AMPI pay prices must logically be reduced relative to other producers who do not subsidize the Houston transportation costs. However, the Secretary did not say that the reduction in AMPI's pay prices inferred from the transportation subsidy would cause AMPI's pay prices to be *significantly* below the Texas order blend price. Moreover, the Secretary did not use any differences in actual pay prices as proof or support for his inference. He used the undisputed evidence outlined in § VI(B)(1)(a) to draw his inference or conclusion.

Similarly, in the Secretary's Partial Final Decision, although the Secretary observed that he would expect *substantial* losses in AMPI's market clearing activities to result in AMPI pay prices *significantly* below the Texas order

blend price, and there is no evidence that such a situation exists, he did not base his action on the lack of evidence of a difference in pay prices but, rather, on a very detailed analysis showing that AMPI failed to prove that it was losing money on its total manufacturing operations, and the circumstances proven by Kraft were not appropriate for correction on a temporary basis.

In short, a dissertation on the price of eggs in China would be as relevant to the Secretary's final decision at issue here as the Secretary's Partial Final Decision relied on by the ALJ and petitioners.

2. <u>Uncontradicted Evidence Supports the Secretary's Findings and Conclusions that the 18¢ Increase in the Zone 8 Location Adjustment Is Appropriate to Establish Equity Among Handlers. These Findings and Conclusions Are Consistent with the Secretary's 1975 Merger Decision Sustained in the Schepps Case.</u>

a. <u>Uncontradicted Evidence Supports the Secretary's 1985 Findings and Conclusions that the Increase in the Zone 8 Location Adjustment Is Appropriate to Establish Equity Among Handlers.</u>

The Secretary found and concluded that an 18¢ increase in Zone 8's location adjustment is appropriate to establish equity among handlers (see particularly Findings 5(d), (i)-(m), (r), (w), (y), (aa), (cc), (ee), (ff), (kk), (qq)). Many of the same findings applicable to inequities among producers, discussed in the preceding subsection, are applicable here. As a gesture towards brevity, they will not be repeated here.

The Secretary found that the possibility for inequity among handlers, arising from a possible "disproportionate application" of "[a]dditional transportation costs that are not reflected in order location adjustments" (Finding 5(w)), became a reality with respect to Dallas handlers. Specifically, the Secretary found that AMPI charged Schepps the higher Houston price at Schepps' Dallas plant on that portion (about half) of Schepps' total fluid sales made in Zone 8 (Houston). In other words, during most of 1981 and 1982, AMPI was charging Schepps at Dallas for a transportation service not received (Findings 5(k), (y), (ee)), in order "to recover hauling costs not reflected under the order," resulting in nonuniform costs among Dallas handlers (Finding 5(y)). The Secretary's decision states (Findings 5(k), (y), (ee)):

> Schepps also presented additional information concerning his actual cost for milk received from AMPI at his Dallas plant as well as comparisons between such cost and a constructed cost for AMPI milk received at Houston on the basis of AMPI price announcements. Schepps notes that prior to May 1983, the difference between AMPI's announced prices at Dallas and Houston reflected a greater amount of the actual, additional transportation cost incurred in shipping milk to Houston. However, Schepps testified that he was charged the Houston price at his Dallas plant on that portion of his total fluid milk sales in Zone 8, which represent about one-half of his total sales. As

a result, Schepps contends that he was charged a price that reflected a part of the cost incurred by AMPI in shipping milk to Houston, and that such charge represents a cost for a service Schepps did not receive. In addition, Schepps contends that such charge was in effect used to subsidize the cost of hauling milk to plants in Houston with whom Schepps competes for fluid milk sales in the Houston area. Since May of 1983 Schepps contends that a significant transportation subsidy exists since the over-order pricing structure was revised to result in a price difference of 36 cents between Dallas and Houston.

. . . .

As previously stated, prior to May 1983, the difference in market Class I prices at Dallas and Houston reflects the higher cost of the service involved in supplying Houston area plants. The net differences in over-order Class I prices are computed by subtracting the order Class I price from the AMPI announced Class I price, and then adjusted by the competitive credit applicable to the Dallas and Houston areas. For all of 1981 and the first two months of 1982, the Houston area competitive credit (or discount) was 26 cents per hundredweight less than the Dallas area credit. During most of the remaining months in 1982, the difference in the credits was 16 cents per hundredweight. Application of the lower credit for Houston area handlers resulted in a higher Houston Class I price relative to Dallas. However, during this entire period, the Houston area credit was applied by AMPI to receipts at Schepps' Dallas plant on that portion of Schepps' sales in Houston (about one-half of Schepps' total sales of packaged fluid milk products). This meant that Schepps was paying a higher price for milk sold in Houston than for milk sold in Dallas, and that such higher price approached the price paid by Houston handlers even though the milk was being received at Dallas from nearby production areas. To the extent that the AMPI price differences between Dallas and Houston reflect the additional cost of hauling milk, the application of the Houston area credit to receipts at Dallas represents a charge for a service that Schepps did not receive, namely, the transportation of milk to Houston. Consequently, costs among handlers that resulted from the application of over-order prices to recover hauling costs not reflected under the order were not uniform or related to specific services.

. . . .

Prior to the revision of the pricing structure in May 1983, a greater proportion of the hauling cost is evident in the difference in prices between Zones 1 and 8. However, as previously stated, the higher Houston price was applied to Schepps in Zone 1. Consequently, contrary to exceptors' contentions, prices were not uniform among handlers as at least two different prices applied at the same location.

Also, it is obvious that Schepps paid a higher price than competito in Dallas.

These facts as to the increased prices charged by AMPI to Schep Dallas during most of 1981 and 1982 are not disputed. That is the pri basis for the Secretary's findings and conclusions as to inequity a handlers resulting from the failure of the order provisions to adeq reflect the transportation costs to Houston (Findings 5(d), (i)-(m), (r), (y), (aa), (cc), (ee), (ff), (kk), (qq)).

In addition, nonmember producers who did not incur the addit expense of subsidizing Houston handlers sold milk to Schepps' compe in Zone 8 at a price that was not arbitrarily increased (as was AMPI's to Schepps) to subsidize hauling costs to Houston. Some of these compe of Schepps also sold milk in Houston in competition with Schepps. T another aspect of the lack of uniformity among handlers at Dallas (Fin 5(j), (aa), (ee)).

The Secretary referred to the arguments of opponents of Sch proposal, and Schepps' counterarguments, relating to whether AMPI s (or could) settle the inequities, as follows (Finding 5(m); see also Fi 5(qq)):

> Opponents of the proposal, in addition to their views previously s forth, contend that Schepps' claims of disorder are a result of AMF pricing practices and are a matter to be settled between AMPI an Schepps. Schepps' counter argument to such claim is that because c competitive conditions in the marketplace, AMPI is unable to institut an equitable pricing structure to reflect the cost of transporting mil that is not provided for under the order.

In any event, the Secretary concluded that since the "inequities a handlers" were, to a large degree, "a result of the failure of the order p structure to reflect a sufficient amount of the current cost of hauling (Finding 5(aa)), it is "appropriate for the Secretary, under the authority c Act, to review and rectify those marketing conditions (such as nonun returns to producers and costs to handlers) that result from a failure o order to reflect an appropriate location value of milk" (Finding 5(cc)).

Petitioners and the ALJ argue that the Secretary has no statutory auth to change the terms of a milk order to modify over-order premiums ch by the market's predominant cooperative. Here, again, they miss the p The Secretary has express statutory authority to adjust Class I pric compensate producers for the economic service (of benefit to handler transporting milk a substantial distance to the extremely deficit Zone reviewing the Secretary's findings as to inequity among handlers resulting the over-order premium situation, we are not looking to see whether order premiums are subject to the Secretary's regulation. His authority establish location adjustments that adequately reflect transportation Indeed, he was directed by Congress in 1985 (in the Food Security Act of and its legislative history) to recognize increased transportation costs i location adjustments (at least for a 2-year period beginning May 1, 198 IV, *supra*).

In short, we are only reviewing the Secretary's findings as to equity among handlers to determine whether the Secretary used his express location-adjustment authority in an arbitrary and capricious manner. The leading agricultural economists in the nation, who are experts in the field of dairy marketing, hold the view that the Secretary should be concerned with "equitable contract relations between handlers and producer organizations" (Nourse Report at 9; § VI(A), *supra*); "inequitable market relationships" (Nourse Report at 12); "equitable treatment of all parties-- producers, [and] dealers [i.e., handlers]" (Nourse Report at 13); and "commercial equity" (Nourse Report at 15). I agree!

In addition, the Milk Pricing Advisory Committee and Kessel agree that the Secretary should be concerned with "equitable treatment of all parties-- producers, [and] dealers [i.e., handlers]" (see note 20). Furthermore, one of the objectives of Congress in raising Class I prices in the Food Security Act of 1985 was to "reduce the need for over-order payments and [provide] equity among handlers supplying the market" (§ IV, *supra*). Congress was concerned with inequities among handlers resulting from over-order premiums, and believed that such inequities should be eliminated by raising order prices, thereby reducing the need for over-order premiums.

In short, I see nothing arbitrary or capricious in the Secretary's conclusion to rely, in part (a small part, I believe), on inequity among handlers arising from AMPI's over-order pricing structure, in deciding to use his express location-adjustment authority, particularly where there is at least a reasonable basis for the inference that the inequitable pricing structure resulted from the Secretary's failure to set the location adjustment at a level that compensated AMPI for the additional expense incurred in transporting milk to Houston.

Contrary to the ALJ's views (Initial Decision at 27), the Secretary's conclusions as to inequity among handlers do not presume that AMPI will treat Schepps (and other Dallas handlers similarly situated) fairly in the future, in the charging of over-order premiums. The Secretary has no control over AMPI's over-order premiums.[33] The Secretary made no finding as to what he expects AMPI to do in the future. But, for the reasons set forth above, the Secretary has the power to increase a location adjustment to more fully compensate producers for the hauling costs incurred in transporting milk to a deficit area. And, in deciding whether or not to use his location adjustment authority (to more adequately compensate producers for their transportation costs), the Secretary may consider, *inter alia*, the fact that the prior failure of the order to adequately reflect increased transportation costs was a circumstance opening up the possibility of inequitable pricing practices (Finding 5(w)), which possibility became a reality (Findings 5(k), (y), (aa), (cc), (ee)).

[33]However, the Secretary can (and should), where appropriate, modify Class I prices compensatory payment provisions, allocation provisions, plant qualification provisions, etc., to permit greater freedom of access to the market, thereby lessening the bargaining power of the cooperatives presently supplying a market (Nourse Report at 31 (§ VI(A), *supra*).

b. The Secretary's 1985 Findings and Conclusions Are Not Inconsistent with Those Made in His 1975 Merger Decision, Sustained in Schepps Dairy, Inc. v. Bergland, 628 F.2d 11 (D.C. Cir. 1979). Petitioners' Lack of Cost Compatibility in Some Areas Is Lawful.

The ALJ and petitioners contend that the Secretary's findings and conclusions here are inconsistent with those made in his 1975 merger decision, which was sustained in *In re Schepps Dairy, Inc.*, 35 Agric. Dec. 1477 (1976), *aff'd*, No. 76-1984 (D.D.C. Aug. 15, 1977), *aff'd*, 628 F.2d 11 (D.C. Cir. 1979). Petitioners (Answer of Petitioners to Respondent's Appeal Petition at 44, 51-52) and the ALJ (Initial Decision at 5, 33-34) rely particularly on the Secretary's 1975 statement (and the same holding by the ALJ in *Schepps*, adopted by the Judicial Officer (35 Agric. Dec. at 1493)) that the "Class I price structure under the Texas order is not intended to assure each handler in the market that he will have cost compatibility at any location at which he may choose to distribute milk" (35 Agric. Dec. at 1486). However, the Secretary recognized that principle in his decision here, where he states Finding 5(ff)):

> Contrary to exceptors' contentions, the change in the location adjustment provided herein is not intended in any way to equate costs among all handlers on the basis of the areas in which they seek to compete. The price change is based on the need to reflect a greater proportion of the current hauling costs in the current order location adjustments to assure that sufficient supplies of milk will be made available to Houston-area plants and to lessen the inequities that have and are continuing to occur among handlers in Dallas and producers in northeast Texas because of costs associated with supplying Houston handlers. The location adjustment increase applies uniformly to all handlers at the same locations.

n fact, additional proof that the Secretary was not trying to equate costs ong all handlers on the basis of the areas in which they seek to compete ound in petitioners' argument that, under the Secretary's location istment provisions, petitioners do not have uniform costs with respect to dlers in areas where they compete, or would like to compete, particularly Zones 9, 4 and 5 (Answer of Petitioners to Respondent's Appeal Petition 5-7, 15, 62-63).[34] The Secretary rejected petitioners' arguments as to their t disadvantage, stating (Finding 5(qq)):

> Additional arguments in exceptions filed on behalf of Houston handlers contend that the Zone 8 price increase discriminates against such handlers who now will have a disadvantage in competing with

[34]Petitioners also complain that they must now pay "54¢ per hundredweight more tha r Dallas competition will pay" (Answer of Petitioners to Respondent's Appeal Petition a But it is undisputed that it costs more to transport packaged milk than bulk milk (Findin . Hence, Schepps and other Dallas handlers selling packaged milk in Houston incu ig costs on their packaged milk of more than 54¢ per cwt.

handlers in Zone 9 to the west and handlers in Zone 4 to the east. Exceptors contend that if hauling costs have increased, they have increased for everyone and that there is no basis for establishing a location adjustment reflecting a 3-cent per hundredweight hauling rate for Zone 8 plants while location adjustments for other zones reflect a 1.5-cent hauling rate.

As previously stated, the purpose of location adjustments is to provide incentives for the delivery of supplies of bulk milk to various plant locations. The evidence in the record establishes that the cost of hauling milk to Houston is in excess of the transportation allowance provided under the order and that inequities among producers and handlers have resulted because of an inability of the over-order pricing structure to effectively recover the costs or to apportion the costs equitably among handlers. As a result, handlers and producer[s] in northern areas, at various times and to various degrees, have subsidized the costs incurred in shipping milk to the Houston area. Consequently, the major thrust of the pricing proposal and the intent of the decision is to establish a more equitable pricing structure by assessing more of the costs associated with moving the milk into Zone 8 upon those plants that receive the milk and occasion the costs.

In other words, the major purpose of a location adjustment is to establish a fair pricing structure under which handlers pay at least a sizeable portion of the costs associated with moving milk to their plants. If that puts such handlers in a disadvantageous competitive position with respect to handlers in other areas in which they choose to market their milk, that is not a circumstance militating against the promulgation of a location adjustment making handlers pay the producers for the economic service provided to them. *Sunny Hill Farms Dairy Co. v. Hardin*, 446 F.2d 1124, 1125-31 (8th Cir. 1971) (§ VII(D), *infra*); and see *United States v. Mills*, 315 F.2d 828, 838 (4th Cir.), *cert. denied*, 375 U.S. 819 (1963), quoted in note 54, *infra*.

To elaborate further with my own views (consistent with the Secretary's approach, but not put so bluntly by the Secretary), there would be something drastically wrong with the Secretary's pricing structure if handlers (such as petitioners), who voluntarily decided to build their milk plants in a deficit zone where almost 90% of the milk has to be imported from other zones (with over half of the milk transported more than 251 miles), could process the milk, and then engage in an uneconomic back-haul of the finished product (i.e., transporting the packaged milk back in the direction from which it came), selling it in competition with handlers more advantageously located with respect to the production areas, and still compete on an even-cost basis with the more-advantageously-located handlers. *Sunny Hill Farms* demonstrates that the Secretary does not have to be concerned with such la[ck] of handler cost-equality (§ VII(D), *infra*). (However, the Secretary w[as] concerned that the Zone 8 Class I price, with the increased locati[on]

adjustment, was in proper alignment[35] with other areas, and he concluded that the prices were properly aligned (Finding 5(oo)).

To return to *Schepps Dairy, Inc.*, since the claimed inconsistency, between the Secretary's decision here and his 1975 merger decision involved in *Schepps*, is so vigorously pressed by petitioners and the ALJ, a detailed analysis of *Schepps* is appropriate. That analysis is set forth in § VII(F), *infra*.

3. The Label "Disorderly Marketing Conditions," Used by the Secretary to Describe the Inequities Among Producers and Handlers, Is Consistent with the Terminology Used by the Leading Agricultural Economists Who Are Experts in the Field of Dairy Marketing, But the Label Has No Significance in This Case.

The Secretary applied the label "disorderly marketing conditions" to the inequities among producers and handlers discussed in the two preceding subsections, § VI(B)(1), (2). He states (Findings 5(v), (aa), (cc); see, also, Findings 5(f), (q), (r), (kk), (oo)):

> For the most part, however, proponents' testimony concerning disorderly marketing conditions resulting from a current inadequacy of location adjustments and the need to increase southern prices centered primarily on the price relationships among Zones 1, 8 and 9, and in particular with the current price level in Zone 8.
>
> . . . .
>
> . . . There is every indication that at times there has been a lack of uniformity in costs to handlers and returns to producers that is not representative of orderly marketing conditions.
>
> . . . .
>
> . . . [I]nequities exist both among producers and handlers. These inequities are representative of disorderly and unstable marketing conditions. . . .

The inequities among producers refers to the Secretary's inference or conclusion that AMPI producers were in an inequitable position vis-a-vis the nonmember producers in the heavy northeast producing counties because AMPI, but not the nonmember producers, was subsidizing the additional transportation costs incurred in transporting milk to deficit Zone 8 (Houston/Beaumont). Not one of those nonmember producers shipped milk to Zone 8. Since May of 1983, AMPI received *additional* transportation costs for transporting milk to Zone 8 of only the order's 36¢ per cwt location adjustment. Inasmuch as that additional 36¢ per cwt did not cover AMPI's

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[35]As shown in this subsection, proper alignment does not guarantee a handler cost compatibility in every area he chooses to distribute milk.

additional transportation costs, the Secretary concluded that AMPI producers "must be subsidizing the cost of hauling milk to Zone 8 plants and their returns are therefore lower than the returns to other producers located in the heavy northeast production area who do not incur the cost of shipping milk to Houston" (Finding 5(dd) (see § VI(B)(1), *supra*)).[36]

The inequities among handlers refers to the period during most of 1981 and 1982 in which AMPI charged higher prices to handlers in Dallas on that portion of their milk distributed by them in Zone 8 (Houston) than it charged other handlers in Dallas who did not distribute milk in Houston. The Secretary concluded that this inequitable treatment resulted from the failure of the order's location adjustment to compensate AMPI for the additional costs incurred in transporting milk to Zone 8 (Houston) (§ VI(B)(2), *supra*).

The Secretary's use of the label "disorderly marketing conditions," relating to the inequities among producers and handlers described above (§ VI(B)(1), (2)), is consistent with the jargon or terminology of the nation's leading agricultural economists who are experts in the field of dairy marketing (see § VI(A), *supra*). It should be noted that the 18 experts comprising the Nourse Committee expressed divergent views as to a number of issues (set forth in footnotes to the report[37]), but not one of the 18 members dissented from the discussion as to "THE CONCEPT OF ORDERLY MARKETING" (Nourse Report at 9), in which it is explained that orderly marketing relates, *inter alia*, to "equitable contract relations between handlers and producer organizations," and "orderly relationships as to prices and supplies between different markets" (*id.*).

(In addition, not one of the 18 Nourse Committee members dissented from the view that the role of the Secretary is to "not perpetuate or promote . . . inequitable market relationships" (Nourse Report at 12), to complement efforts to "maintain economic order in their industry," to "secure equitable treatment of all parties--producers, dealers [i.e., handlers] . . . not only within each local or regional market but throughout the system" (*id.* at 13), and to "promote economic orderliness and commercial equity" and "equity among producers" (*id.* at 15)).

Similarly, the Milk Pricing Advisory Committee recognized that the "concept of orderly marketing" "implies the establishment of relations between producers and handlers which facilitate fair, but not disruptive, competition" (Advisory Comm. Report at 4-5) (see § VI(A), *supra*).

Accordingly, there is a solid basis for the Secretary's application of the label "disorderly marketing conditions" to the inequities among producers and handlers described above. Further, there is a solid basis for the Secretary to

[36]As shown in § VI(B)(1), *supra*, the Secretary's inference that there was inequity among producers is not based on differences in actual pay prices received by nonmembers and AMPI members. Conversely, the Secretary concluded that AMPI returns were lower because of the inequity. The inequity was that AMPI producers, but not nonmembers, "must be subsidizing the cost of hauling milk to [deficit] Zone 8 [Houston/Beaumont] plants" (Finding 5(dd)).

[37]See the Nourse Report at 13-14, "Note by the Chairman," for a discussion of the divergent views as to some issues.

be concerned about such inequities among producers and handlers (see § § VI(A)). As shown above (§ IV), in the legislative history of the Food Secu Act of 1985, amending § 8c(5)(A) of the Agricultural Marketing Agreem Act of 1937, Congress expressed its concern over inequities among produc and handlers caused by over-order premiums, resulting from order prices t do not adequately reflect transportation costs.

In any event, however, petitioners' and the ALJ's attack on the Secreta use of the label "disorderly marketing conditions" is "Much Ado Ab Nothing." The Secretary's authority is not increased one iota by categoriz the inequities among producers and handlers as "disorderly marke conditions." Presumably, petitioners and the ALJ believe that the la "disorderly marketing conditions" is significant because the term "ord marketing conditions" is used in § 2(1) and (4) of the Act (7 U.S.C. § 602 (4) (emphasis added)), as follows:

> It is declared to be the policy of Congress--
>
> (1) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such *orderly marketing conditions* for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices as defined by section 1301(a)(1) of this title.
>
> . . . .
>
> (4) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such *orderly marketing conditions* for any agricultural commodity enumerated in section 608c(2) of this title [which includes milk] as will provide, in the interests of producers and consumers, an orderly flow of the supply thereof to market throughout its normal marketing season to avoid unreasonable fluctuations in supplies and prices.

As to the first subsection quoted above (7 U.S.C. § 602(1)), the pa concept has been a dead issue under the milk order program since inception. The Secretary is authorized by § 8c(18) of the Act to ignore pa prices if he finds that they are not "reasonable in view of the price of fee the available supplies of feeds, and other economic conditions which aff market supply and demand for milk and its products in the marketing ar (7 U.S.C. § 608c(18)). Since the inception of the Federal milk order progr the Secretary has found that parity prices are unreasonable, and he established prices to "reflect such factors [i.e., the price of feeds, etc.], ins a sufficient quantity of pure and wholesome milk . . ., and be in the pul interest" (*id.*; see Finding 5(vv)).[38]

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[38]See, *e.g.*, the Secretary's finding made in 1938 as to the New York milk order (3 Fed. 1945, 1946, col. 1, finding 2 (1938)). The Milk Pricing Advisory Committee states (Advi Comm. Report at 7) (emphasis added):

As to the second subsection quoted above, it is the policy of the Act, "[t]hrough the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions . . . as will provide . . . an orderly flow of the supply [of milk] to market . . . to avoid unreasonable fluctuations in supplies and prices" (7 U.S.C. § 602(4) (emphasis added)). That subsection confers no authority in the Secretary to eliminate or prevent disorderly marketing conditions other than through the exercise of the powers expressly set forth in other sections of the Act.[39]

Furthermore, the first sentence of § 8c(5) of the Act expressly states that the Secretary is authorized to include in milk orders the "following terms and conditions, and (except as provided in subsection (7) of this section [which admittedly is irrelevant here] no others" (7 U.S.C. § 608c(5)). Hence, unless the Secretary has express statutory authority in § 8c(5) of the Act to increase the location adjustment at issue here, he does not acquire that authority under the statement of policy in § 2(4) of the Act. Conversely, if the Secretary has statutory authority to increase the location adjustment under the adjustment provisions of 7 U.S.C. § 608c(5)(A), which he does (§ III(D), *supra*), that authority would not be decreased in any manner if inequities among producers and handlers did not constitute disorderly marketing conditions.

In short, applying the label "disorderly marketing conditions" to the circumstances involving inequities among producers and handlers does not in any manner change the nature of the inequities. "A rose by any other name would smell as sweet" (Shakespeare, *Romeo and Juliet*, Act II, scene ii, line 43). Similarly, the Secretary's authority does not change by virtue of the label "disorderly marketing conditions." Accordingly, the use of the label "disorderly marketing conditions" is, or should be, a non-issue. But to the extent it was erroneously injected into the case by petitioners and the ALJ, the Secretary properly used the label here.

In one sentence of his final decision, the Secretary uses the term "orderly marketing conditions" in a manner not *directly* related to inequities among producers or handlers. He states (Finding 5(oo)):

While parity prices are established as the general goal of the Act, parity prices have *never* been considered an adequate standard in determining Federal order prices. Section 8c(18) recognizes this by spelling out more specific objectives for fluid milk priced under orders.

[39]Petitioners mistakenly argue that 7 U.S.C. § 602(4) gives the Secretary "power to address 'disorderly' marketing conditions . . . which *cause* unreasonable changes in *supplies and prices*" (Answer of Petitioners to Respondent's Appeal Petition at 37; and see *id.* at 58). The ALJ expresses the identical erroneous view (Initial Decision at 35). However, 7 U.S.C. § 602(4) gives the Secretary no *power* to do anything--it merely expresses congressional *policy*. That policy demonstrates congressional understanding of the fact that disorderly marketing conditions have the inherent capacity to disrupt the orderly flow of milk to market. The subsection does not purport to define "orderly marketing conditions," or to limit the meaning of such term, as it is generally understood by agricultural economists.

A price increase for Zone 8 is necessary to establish orderly market conditions by reflecting a greater proportion of the cost of hauling n to Zone 8 plants.

This concept by the Secretary is consistent with the view of the] Committee that "THE CONCEPT OF ORDERLY MARKETING" ir "orderly relationships as to prices and supplies between different m (Nourse Report at 9). Orderly relationships as to prices between di markets implies "transportation differentials . . . closely related to transport costs" (Nourse Report at 24). Hence here, too, the Secr application of the label "orderly marketing conditions" is sound. But, reasons stated immediately above, the label is meaningless.

A final word should be said about one other sentence in whi Secretary used the term "orderly marketing" practices. The Secretary decision states (Finding 5(q) (emphasis added)):

> Also, it is not necessary at all times to recognize the average c of hauling milk to alternative outlets, particularly in areas where, during periods when, there are substantial supplies of relatively neai milk available to meet fluid milk needs. In effect, in such situatio milk is made available because of a lack of alternative outlets. I price adjustments are *necessary* to reflect increased hauling costs there is sufficient evidence that ample supplies are being ma available under *orderly marketing practices* and under circumstanc from which it could be concluded that sufficient supplies of milk a likely to continue to be made available.

Petitioners give their version of the Secretary's theoretical discussio quoted, in two places, both of which are incomplete or inaccurate (A of Petitioners to Respondent's Appeal Petition at 32, 54).[40] In the first the Secretary is not setting forth when increased hauling costs can (or ca lawfully be used to *justify* increased location adjustments, or to *perm* Secretary to increase location adjustments. The Secretary is merely re circumstances under which it is not *necessary*, or *mandatory*, that he in location adjustments because of increased hauling costs.

In the second place, one of the circumstances listed by the Secret "orderly marketing" practices. Since it is the *Secretary's list* of circumst we are analyzing, the *Secretary's definition* of "orderly marketing" pract *controlling*. As shown above in this subsection, the type of inequities a

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[40]Petitioners state (*id.* at 32, 54) (emphasis added):

> The Secretary's Decision in this case correctly acknowledges that increases hauling costs do not, standing alone, *justify* changes in location adjustments whe ample supplies are available under orderly marketing practices and are likely to rema so (50 Fed. Reg. 9666).
>
> . . . .
>
> Second, the Decision itself acknowledged that changes in location adjustmer are unnecessary, even when hauling costs are not compensated, where adequa supplies are available and are likely to continue to be available (*Id.* at 9666).

producers and handlers discussed in § VI(B)(1), (2), are regarded by the Secretary as "disorderly marketing" conditions or practices. Hence this theoretical discussion by the Secretary is not at all helpful to petitioners here.[41] Nor would this theoretical discussion prevent the Secretary from ultimately prevailing (perhaps after a remand), solely on the grounds set forth in § III, *supra* (i.e., relating to compensating producers for providing the economic service of transporting milk a substantial distance to Zone 8), even if the inequities and disorderly marketing findings were (erroneously) overturned by a reviewing court, since the Secretary is not, in this theoretical discussion (Finding 5(q)), purporting to set forth the limits of his statutory authority.

4. The Secretary's Conclusion that the Zone 8 Location Adjustment Should Be Increased to Attract Milk to Zone 8 Is Sound Economic Reasoning, Irrespective of Whether or Not There Was Any Potential Threat to Zone 8's Milk Supply. The Secretary's Views that the Inequities Among Producers and Handlers (Labeled as "Disorderly Marketing Conditions") Had the Potential to Disrupt the Movement of Milk to Zone 8 Are Consistent with the Views of the Leading Agricultural Economists Who Are Experts in the Field of Dairy Marketing.

The Secretary's findings and conclusions relating to attracting milk to Zone 8 by means of increasing the location adjustment should be read in the light of (i) the Secretary's duty under 7 U.S.C. § 8c(18)) of the Act, and (ii) the views previously expressed by the leading agricultural economists who are experts in the field of dairy marketing (§ VI(A), *supra*).

First, as to the Secretary's duty, § 8c(18) of the Act (7 U.S.C. § 608c(18)) requires the Secretary to set milk prices, including location adjustments, at a level that will, by themselves, "insure" a sufficient quantity of milk, now and in the future. Section 8c(18) provides (7 U.S.C. § 608c(18) (emphasis added)):

> Whenever the Secretary finds, upon the basis of the evidence adduced at the hearing required by section 608b of this title or this section, as the case may be, that the parity prices of such commodities are not reasonable in view of the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk and its products in the marketing area to which the contemplated agreement, order, or amendment relates, he shall fix such prices as he finds will reflect such factors, insure a sufficient quantity of pure and wholesome milk to meet current needs and further to assure a level of farm income adequate to maintain

[41] My analysis here is also relevant to the criterion included in the Secretary's list that there must be "circumstances from which it could be concluded that sufficient supplies of milk are likely to continue to be made available" (Finding 5(q)). As shown in the following subsection, I interpret the Secretary's use of that terminology to refer to circumstances where the *pricing provisions of the order* are adequate by themselves to attract milk to a deficit zone.

productive capacity sufficient to meet anticipated future needs, and in the public interest.

As shown in § VI(B)(3), *supra*, the Secretary has found that parity are unreasonable for the last 50 years. Hence, for the last 50 yea Secretary has been under the mandate to fix order prices that *in* sufficient quantity of milk in the marketing area (§ 8c(18)). In this r the statute states that the Secretary "shall" fix such prices. The word is ordinarily the language of command. *Anderson v. Yungkau*, 329 U. 485 (1947); *Escoe v. Zerbst*, 295 U.S. 490, 493 (1935).

The word "insure," used in the statutory mandate, means to "ass "ensure" (*Webster's Third New International Dictionary (Unabridged* (1981). "Assure" means "to make sure or certain: put beyond all dou at 133)." "Ensure" means "to make sure, or safe: GUARANTEE" (*id.* Both terms "indicate a making of an outcome or event sure, cert inevitable as a consequence or concomitant" (*id.*).

Furthermore, Congress stated in the legislative history of the Security Act of 1985, amending § 8c(5)(A) of the Agricultural Ma Agreement Act of 1937, that order provisions, including location adjus should attract milk to deficit areas. The legislative history states (§ IV,

> In the implementation of the minimum prices for highest classification of milk, the Secretary is also required to make necess location adjustments within each order in order to assure that the adjustments are effective throughout the order. In addition, Secretary is required to address the varied locations of delivery of n throughout each marketing order.
>
> . . . .
>
> It is noted that the 1983-1984 diversion program exacerbated supply deficiencies in certain areas of the country. The prevai minimum Federal order prices do not reflect the cost of moving from surplus to deficit areas. The result is therefore an ineffective of the Order System to assure an adequate supply of milk for fluid in deficient areas. The proposed marketing order minimums inclu in Title I will facilitate the acquisition of an adequate supply of for fluid use in those deficit areas.
>
> The proposed changes in the marketing order minimums will m fully address the cost of transferring milk from the surplus areas to deficit areas which in turn will assist in providing a more uniform p to handlers or uniform payments to producers. At the moment, t are three major problems with respect to the operation of the Fed order systems: (1) minimum Federal order Class I prices are adequate to attract the necessary supply to meet the Class I need deficit areas. . . .

> . . . The Act does not suggest that milk be locally produced nor that it come from any specific area. It only requires that milk be attracted to those locations where it is needed for fluid use. The manner in which to attract milk is through adjusted prices. In deficit areas, that means the price must be high enough to cause it to be moved from where it is being produced to where it is needed.

Accordingly, the Secretary is required by § 8c(18) of the Act to make certain that the Class prices and location adjustments in every milk order are high enough to attract milk to every part of a marketing area. There is no basis for the view, implicit in petitioners' briefs and the ALJ's decision, that the Secretary should wait to see if over-order premiums, or surplus milk situations, will provide Zone 8 with an adequate supply of milk.

The Secretary's duty under § 8c(18) is mandatory--irrespective of the supply-demand situation. The order prices themselves--without any reliance on over-order premiums, must guarantee that milk will move to Zone 8. The Secretary's decision should be read in the light of that statutory duty.

Second, the Secretary's decision should be read in the light of the views expressed in dairy marketing literature, in which the Secretary is well versed. The Nourse Committee recognized the desirability of setting order prices on the basis of "location economics," i.e., pricing milk according to its location value (Nourse Report at 23 (§ VI(A), *supra*). The Nourse Committee expressed the view that location adjustments should be "closely related to actual transport costs" (*id.*). Those views are categorical principles that are applicable irrespective of whether there is any shortage of milk, or any threat to a deficit area's milk supply.

Similarly, the report to Congress in 1984 on the Federal milk marketing order program criticizes the Secretary for allowing location adjustments in milk orders to get "seriously out-of-date," and recommends "regular updating of location differentials within orders and between orders," taking into account "not only changes in hauling costs, but also changes in the location of production, processing plants, and milk movements" (ERS Report to Congress at 76). In another study of the economic effects of the Federal milk order program, it is recognized that "economic efficiency would be better, but far from perfectly, served, if zone differentials reflected transportation costs" (Kessel, *Economic Effects of Federal Regulation of Milk Markets*, 10 J. Law & Econ. 51, 65 (1967)). In addition, the Milk Pricing Advisory Committee recognized that § 8c(18) of the Act "directs him [the Secretary] to establish prices at levels necessary to assure an adequate supply of milk" (Advisory Comm. Report at 39) (§ VI(A), *supra*). Those views, also, are not dependent on any shortage of milk, or any threat to a deficit area's milk supply.

The Nourse Committee states that it is the Secretary's duty to "assure consumers that they will have access to adequate and dependable supplies of high quality milk" (Nourse Report at 13), and the Committee believes that if the Secretary properly set Class I prices and location adjustments, there would be no need for over-order premiums, which it found to be highly detrimental to the milk order program (*id.* at 31, 94, 98-99). Similarly, the Milk Pricing Advisory Committee expressed the view that over-order premiums that are no

marketwide tend to destroy one of the basic purposes of milk ord
uniformity of prices to handlers (Advisory Comm. Report at 42).
legislative history of the Food Security Act of 1985 is to the same effec
supra).

Certainly, the Secretary has the right (if not the duty) to estab
change Class I prices and location adjustments in a manner to "en
milk to move" where it is needed, irrespective of whether there is any
of milk or any threat to an area's milk supply. *Walmsley v. Block*,
1414, 1418, 1419-20 (8th Cir. 1983) (§ VII(G), *infra*); *accord Sunny Hi
Dairy Co. v. Hardin*, 446 F.2d 1124, 1126 (8th Cir. 1983) (§ VII(D),

The Secretary's findings and conclusions relating to attracting
Zone 8, by increasing Zone 8's location adjustment, fall into two cate
(i) those that merely recognize that the purpose (or a purpose) of eve
I price and every location adjustment in every milk order is to attract
where it is needed (which purpose is applicable irrespective of wheth
is any threat to an area's milk supply), and (ii) those findings and con
recognizing that inequities among producers and handlers (lab
"disorderly marketing conditions") have the inherent potential to dis
movement of milk. The findings and conclusions falling into the first
are discussed first, immediately below.

The Secretary's decision states that the purpose of the order's
tructure is to provide assurance that milk will move where it is nee
hat, under the facts of this record, a consideration of whether the
rder location adjustments are providing the necessary price incen
milk movements is critical only with respect to Zones 8 and
Secretary's decision states (Finding 5(v)):

> The purpose of the current order pricing structure of incre
> prices from north to south is to provide assurance that milk will
> to the deficit southern consumption centers. From the pre
> description of the relationships of the locations of supplies of
> demand for fluid milk, it is obvious that such a pricing struc
> continues to be necessary under current marketing condit
> However, it appears that a consideration of whether the current
> location adjustments are continuing to provide the necessary
> incentives for milk movements is critical only with respect to Zo
> and 9. These zones contain major consumption centers, are extre
> deficit in terms of local production, and must obtain increasing sup
> of milk from distant alternative sources.

The foregoing statement is sound, considering the Secretary's
duty, and from an agricultural economist's viewpoint, irrespective of
here is any potential threat to Zone 8's milk supply.

Similarly, the following statement by the Secretary as to increa
location adjustment "to attract milk to deficit Zones 8 and 9"
economic logic, and in accordance with the Secretary's statuto
irrespective of any potential threat to Zone 8's milk supply (Finding

> The previous and current over-order price structure has
> affected by competitive conditions that are influenced by m

> supply/demand relationships. There is every indication that at times there has been a lack of uniformity in costs to handlers and returns to producers that is not representative of orderly marketing conditions. The inequities among handlers and producers, to a large degree, are a result of the failure of the order pricing structure to reflect a sufficient amount of the current cost of hauling milk. The magnitude of the deficiency [in the location adjustment] is amplified because of the substantial distances involved and the amounts of milk that must be moved to the major consumption centers in the South. Consequently, a greater transportation allowance needs to be considered under the order to attract milk to the deficit Zones 8 and 9 from the nearest alternative sources of supply that are available to meet fluid milk needs.

Similarly, the following statements by the Secretary are sound, from an agricultural economist's viewpoint, and considering the Secretary's statutory duty, irrespective of whether there is any potential threat to Zone 8's milk supply (Findings 5(ff), (kk), (rr)):

> The price change is based on the need to reflect a greater proportion of the current hauling costs in the current order location adjustments to assure that sufficient supplies of milk will be made available to Houston-area plants and to lessen the inequities that have and are continuing to occur among handlers in Dallas and producers in northeast Texas because of costs associated with supplying Houston handlers. . . .
>
> . . . .
>
> . . . The higher price will cover a greater proportion of current transportation costs, establish a greater degree of equity among producers and handlers, provide a greater assurance that supplies of milk will be made available to supply the fluid milk needs of the largest consumption center in the marketing area and promote stable and orderly marketing conditions as required by the Act. . . .
>
> . . . .
>
> . . . As such, an increase in the Zone 2 price would negate the primary objective of the price increase in Zone 8 to attract a supply of milk from the northeast Texas supply area.

Finally, the following conclusory statement by the Secretary is sound, fror an agricultural economist's viewpoint, and considering the Secretary's statutor duty, irrespective of whether there is any potential threat to Zone 8's milk supply (Finding 5(f)):

The 18-cent per hundredweight increase in the Class I and blen
is necessary to reflect increases in hauling costs and to ass
adequate supply of milk for fluid use for the largest consu
center in the marketing area and to promote the orderly ma
of the substantial volumes of milk that must be shipped great di
from the major production areas in the market to meet the flu
needs of this deficit supply area.

The only evidence required to support the foregoing findings
need to increase the Zone 8 location adjustment in order to attr
Zone 8 under the location adjustment provisions of the order is th
that milk must be transported to Zone 8, and the 36¢ location
provision of the order does not cover the transportation costs. Peti
not dispute those facts (§ III(A), (B), *supra*).

In the following statement, the Secretary recognizes that
sufficient supplies of milk overall in the Texas market, but that ther
extremely deficit areas. All of the statements in the paragraph q
are sound, from an agricultural economist's viewpoint, and consi
Secretary's statutory duty, irrespective of whether there is any t
zone's milk supply, except the one sentence that is emphasize
emphasized sentence, the Secretary states the theoretical truism th
are too low at any location relative to another, "there is a dange
lower priced area will not be able to procure a sufficient supply of n
Secretary's decision states (Finding 5(q)):

> Although there are sufficient supplies of milk overall th
> associated with the Texas market, certain portions of the mark
> extremely deficit in terms of local production. As a result, subs
> amounts of milk must be shipped long distances to meet the flui
> needs of certain southern portions of the marketing area. The c
> order price structure is based on the need to increase prices
> north to south and maintains an alignment of prices among pl
> provide an incentive for milk to move from where it is produced
> consuming centers where it is needed. In this regard, opponen
> the location adjustment increase] contention that they would be
> at a competitive disadvantage in making fluid milk sales relat
> plants in northern areas is misplaced. It is true that significant
> differences among nearby plants would result in competitive ine
> among such plants in selling fluid milk products. However, the pr
> emphasis with respect to the alignment of prices must be placed
> alignment of prices among various locations that is necessary to
> a supply of milk to such locations from areas that must be relied
> for sources of supply. <u>If prices are too low at any location relat
> another area that relies upon the same source of supply, ther
> danger that the lower priced area will not be able to proc
> sufficient supply of milk</u>. The appropriate alignment of prices
> be a reflection of the difference in the cost of transporting milk
> alternative outlets from a common production area. It is, how
> mpossible to establish a precise alignment of prices among
> ecause of the variability in the costs of hauling milk. At be

alignment of prices usually represents an average of the variable costs of hauling milk that is representative of market experience.

In understanding the Secretary's thought expressed in the sentence emphasized in the preceding quotation, it is fair to read the sentence in the light of the Secretary's statutory duty to fix location adjustments that, by themselves, guarantee that milk will be attracted to a deficit area. Similarly, it is fair to read the sentence in the light of the views expressed by leading dairy experts, that class prices and location adjustments should be set at a level that insures the movement of milk to deficit areas (§ VI(A), *supra*).

Finally, in construing the Secretary's thought as to a danger that a lower priced area, relying upon the same source of supply as a higher priced area, will not be able to procure a sufficient supply of milk, it is fair to attribute to the Secretary the same knowledge that is had by every other person who is familiar with the Federal milk order program, *viz.*, that prices established under Federal orders are *minimum prices* only. Nothing prevents handlers from paying over-order premiums. If it were necessary to prove that the Secretary was aware of that fact when the present decision was issued, it is shown by the Secretary's statements in the decision that during most of 1981 and 1982, AMPI's over-order premiums resulted in Class I prices in Houston about 72¢ per cwt higher than in Dallas (Finding 5(x)).

Since the Secretary knew that handlers can, and do, pay over-order premiums, at times, in order to obtain their milk supply, the Secretary's statement, that if "prices are too low at any location relative to another area that relies upon the same source of supply, there is a danger that the lower priced area will not be able to procure a sufficient supply of milk," should be interpreted to express the view that there is a danger that the lower priced area will not be able to procure a sufficient supply of milk *under the order's pricing provisions*.

The Secretary knows, as well as anyone else who knows anything about dairy marketing in the United States, that *money moves milk*! If a location adjustment is not adequate to compensate producers for transporting milk to a deficit zone, and producers have the economic bargaining power to exact an over-order premium, handlers in a deficit zone will pay the over-order premium, thereby attracting milk to the deficit zone.[42] (That was the situation during most of 1981 and 1982, when AMPI received an additional 72¢ per cwt from Houston handlers over the amount AMPI received from Dallas handlers (Finding 5(x)). But, as explained above in this subsection, the Secretary is not required to depend upon over-order premiums to move milk to the desired locations. The Secretary has the right (if not the duty) to set Class I prices and location adjustments at the level that will move the milk to deficit areas, as required.

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[42]If producers do not have the economic bargaining power to exact an over-order premium because of a surplus situation, milk will likely flow to the deficit area because of a lack of a reasonable alternative outlet (Finding 5(q)).

In the following statement, the Secretary again recognizes that at [
milk is moving substantial distances to the deficit areas and all pla
adequately supplied. Nonetheless, the Secretary states that a fai
recognize the minimum price adjustments that are necessary
jeopardize" the continued movement of milk. The Secretary's decisio
(Finding 5(r)):

> The record indicates that milk is moving substantial distance meet fluid milk needs and that plants operating in the various pri zones throughout the marketing area appear to be adequately suppl However, contrary to the views expressed by opponents of any pri changes, the current adequacy of supply is not the sole basis determining whether price changes in any area are necessary. testimony reveals that the market pricing structure, as it curre exists and has been modified during recent years, has resulte nonuniform returns to producers and nonuniform costs to hand These inequities among producers and handlers are not conduciv the orderly marketing of milk that must be transported substa distances on a continuing basis to meet the fluid milk needs of cer southern deficit areas. A failure to recognize the minimum p adjustments that are necessary could jeopardize the contir movement of milk from northern production areas to soutl consumption centers.

. . . .

> . . . The Houston area has experienced a significant increase in population and an increasing proportion of milk supplies from distant areas must be obtained to meet fluid milk needs. At the same time, transportation costs have increased to the point that the current Zone 8 location adjustment no longer represents a sufficient degree of the added service or cost involved in supplying milk to plants in such area. Although the record indicates that Zone 8 plants have obtained sufficient supplies of milk it also establishes that, because of higher transportation costs and various changes in the over-order pricing structure, inequities exist both among producers and handlers. These inequities are representative of disorderly and unstable marketing conditions that threaten the continued availability of milk supplies for Zone 8 plants and, therefore, must be addressed by the Secretary under the purposes and requirements of the Act. Certainly it is appropriate for the Secretary, under the authority of the Act, to review and rectify those marketing conditions (such as nonuniform returns to producers and costs to handlers) that result from a failure of the order to reflect an appropriate location value of milk.

Since the Secretary recognizes repeatedly in his decision that notwithstanding the inadequacies of the present location adjustment provision to adequately compensate producers for the additional cost incurred in transporting milk to Zone 8, adequate milk was being transported to Zone 8, the Secretary's decision should be interpreted as merely reflecting the economically sound viewpoint that inequities among producers and handlers (referred to by agricultural economists as "disorderly marketing conditions") have the inherent potential to disrupt the movement of milk, and that it is appropriate for the Secretary to eliminate such inequities, thereby eliminating the threat that exists to the movement of milk *under the pricing provisions of the order.* As stated above in this subsection, the Secretary has the right (if not the duty) to set order prices that move milk where it is needed, without relying on over-order premiums to do the job that the Secretary failed to do under the order.

For the foregoing reasons, the Secretary's findings and conclusions relating to attracting milk to Zone 8, and to the potential for inequities among producers and handlers (i.e., disorderly marketing conditions) to disrupt the movement of milk to Zone 8, are sound from the viewpoint of the Secretary's statutory duty, and are consistent with the views of the leading agricultural economists who are experts in the field of dairy marketing. Petitioners' and the ALJ's contentions as to a lack of evidentiary support for these findings and conclusions are based on a misinterpretation of the Secretary's decision. They were looking for evidence to show that, even with over-order premiums, there was a threat that milk would not flow to Zone 8. Such evidence is not necessary. The Secretary is only required to consider whether there is a *guarantee* that milk will flow to Zone 8 *under the order's pricing provisions.*

In this respect, it is significant that in 1985, at about the same time

the Secretary determined that it was necessary to increase the location adjustment for Zone 8, Congress determined that it was necessary to increase Class I prices throughout the country (and, specifically, to increase the Texas Class I price differential from $2.32 to $3.28), in order to attract milk under order prices to the locations at which it was needed, and to "assure an adequate supply of milk for fluid use in deficient areas" (§ IV, *supra*).

VII. <u>The Cases Involving or Discussing Location Adjustments Are Either Supportive of the Secretary's Decision Here, or Not Inconsistent with It</u>.

A decision by the Supreme Court is discussed first, followed by a chronological discussion of relevant circuit court decisions. A chronological analysis of the circuit court decisions is particularly helpful since later cases frequently agree with principles set forth in earlier decisions, without setting forth the principles as fully as they were first set forth. To fully understand the later decisions, we must first understand the earlier decisions with which they are in agreement.

A. *Zuber v. Allen*.

Zuber v. Allen, 396 U.S. 168 (1969), is a case involving a "nearby" differential based on the location of a producer's farm, rather than a location adjustment based on transportation costs (see § II, *supra*). However, in holding invalid the nearby differential at issue in the case, the Court explained that the legislative history shows that all of the differentials, or adjustments provided for by the Act are based on economic considerations, *viz*., to compensate or reward the producer for providing an economic service or benefit to the handler. The Court states (396 U.S. at 181-84, 188, 189 (footnotes omitted)):

> The legislative history strongly suggests that "market differentials," as well as all the other differentials, contemplated particular understood economic adjustments. The House Report, in discussing the allowable adjustments characterizes the market differential as a payment over and above the transportation costs, *i.e.*, a location differential, for delivery to the primary market. <u>13</u>/ Thus farmers would share with handlers the savings from bypassing country-station processing and handling the milk only at the city plant.
>
> . . . .
>
> . . . The congressional purpose is further illumined by the character of the other statutory differentials for "volume," "grade or quality," "location," and "production," <u>17</u>/ all of which compensate or reward the producer for providing an economic service of benefit to the handler. <u>18</u>/
>
> . . . .

> While market differentials customarily applied need not be restricted to the sole illustration in the House Report, that illustration, taken in conjunction with the discussion of all the statutory differentials, suggests that the permissible adjustments are limited to compensation for rendering an economic service. 23/ The challenged nearby differentials do not fall into this category. 24/
>
> . . . .
>
> Since the Secretary made no findings to that effect, the Court need not consider whether they would justify payment of the nearby differential in view of the legislative history indicating that the statute contemplates adjustments primarily for economic costs to handlers that are absorbed or reduced by the producers.

The location adjustment at issue here squarely meets the criterion in *Zuber*, i.e., it is to compensate the producers for providing the economic service of transporting milk to the handlers in Zone 8, an extremely deficit area.

The ALJ states (Initial Decision at 30-31):

> To the extent a location adjustment differential does not fully recompense the difference between the Class I base price and actual hauling costs, producers may negotiate over-order charges and "receive their compensation directly from the handlers and not out of the marketwide pool." *Zuber, supra*, at 396 U.S. 190.

However, nothing in *Zuber* suggests that producers should negotiate over-order charges and receive their compensation directly from handlers, rather than from the order provisions, *with respect to the differentials expressly authorized by the Act*.

The ALJ is quoting from the following sentence from the Court's opinion in *Zuber* (396 U.S. at 190):

> We think the analysis of the court below was correct: if there is any economic benefit here, producers should receive their compensation directly from the handlers and not out of the marketwide pool. 131 U.S. App. D.C., at 114, 402 F.2d, at 665.

However, that sentence has no applicability to the facts here. The Court was referring to the nearby differential at issue in *Zuber*, and the Court expressly held that the nearby differential was not authorized by the Act, and did not fall into the category of compensation to producers for rendering an economic service to the handlers. Since the nearby differential involved in *Zuber* was not a differential authorized by the Act, it necessarily follows that any compensation to the producers for being located nearby to the market would have to come directly from the handlers, i.e., through over-order premiums. In the absence of statutory authorization for such a payment under

order provisions, there is no other source for compensation to the produc other than from an over-order premium. But that dicta is totally irrelevant the appropriate method for producers to receive compensation f transportation costs, since the Act expressly authorizes location adjustmen

Furthermore, as shown in § VI(B)(4), § 8c(18) of the Act directs t Secretary to fix prices that guarantee the movement of milk to deficit are and as shown in § IV, *supra*, Congress expressly stated in 1985 that produc should receive compensation for transportation costs through the Class I pri and location adjustments, rather than through over-order premiums. T same view was expressed in 1962 by a distinguished committee of m marketing experts, the Nourse Committee, and by other distinguished expe (see § VI(A), *supra*). Hence the ALJ's reliance on *Zuber* is misplaced, a his views are out of harmony with the Act (§ 8c(18)) and the views of lead milk marketing experts.

The ALJ similarly misconstrued *Zuber* in his discussion of the Secretar price-alignment considerations. He states (Initial Decision at 37- 39):

> As an additional justification for the ordered increase, the Secretary reasoned: 51/ [ALJ's citation omitted; the language in quotation marks below appears in my Findings 5(kk), (oo)]
>
> > ". . . Also, the increased location adjustment represents a refinement of the current [price] alignment among Zones 1, 8 and 9 by recognizing the nearest alternative different sources of supply for Zones 8 and 9 and the proximity of such supply areas to Zone 1 consumption centers.
> >
> > "The price increase in Zone 8 that improves the price alignment among Zones 1, 8 and 9 does not significantly disrupt the price alignment among Zone 8 and other zones of the marketing area."
>
> Apparently, the evidence received at the 1983 hearing convinced the Assistant Secretary that milk purchased for Class I fluid uses had a higher economic value in Zone 8 than elsewhere in the Texas market. He also reasoned that the Order's minimum Class I price could be increased 18 cents per hundredweight for the Zone 8 submarket, and only for that submarket, without destroying intermarket and intramarket price alignments.
>
> But may the Secretary adjust location adjustment differentials to refine price alignments; refinements couched in terms of "recognizing the nearest alternative different sources of supply"? I think not.
>
> *Zuber v. Allen* made it very clear that location adjustment differentials have the limited uses contemplated by Congress when the Act became law some forty years ago. They definitely may not be used to better compensate or otherwise "recognize" a market's nearby producers.

Nor may they be principally used to refine alignments between the submarkets that result when milk orders regulating individual markets are replaced by a composite order that treats a massive territory the size of Texas as a single market and the various metropolitan centers within as its submarkets. Congress never contemplated this use of location adjustment differentials, and under a strict reading of *Zuber*, this is not a permissible technique.

The problem is that *Zuber* allows no reading other than a strict one which hampers any innovation in the use of milk orders. Even though, at the time of Order 126's promulgation, the Secretary could incidentally consider and achieve intra-market price alignments in the course of fixing location adjustments to assure each submarket an adequate milk supply, once those location adjustment differentials were initially fixed he was without power to change them for the sole and express purpose of better refining the alignments.

Nothing in *Zuber* states, or even remotely suggests, that in determining whether to exercise his permissive authority to adjust a location adjustment to better compensate producers for the economic service of transporting milk to a deficit area, the Secretary cannot consider price alignment among other zones or markets. Price alignment is a necessary factor to be considered in setting class prices and location adjustments at a level that will attract milk to particular areas.

The holding in *Zuber*, invalidating a "nearby" differential based on the location of a producer's farm rather than the location of the handler's plant to which milk is delivered, has no relevancy to the Secretary's action here. The location adjustment involved here is squarely based on the location at which delivery of milk is made to handlers--not on the location of the producer's proximity to the market center (Zone 1 (Dallas)). Contrary to the ALJ's understanding, nothing in the Secretary's decision indicates that the location adjustment was "used to better compensate or otherwise 'recognize' a market's nearby producers" (Initial Decision at 38).

The location adjustment here, like all location adjustments, is applicable irrespective of the location of the producer's farm. All handlers in Zone 8 must pay the 54¢ per cwt location adjustment irrespective of the location of the producer's farm. To illustrate this vital point with a hypothetical example, if Producer A's farm were located across the street from a Houston handler's plant, and Producer A transported milk only 250 feet to the plant, and Producer B's farm were located 250 miles from the Houston handler's plant, and Producer B transported milk 250 miles to the plant, the Houston handler would have to pay Producer A and Producer B the identical 54¢ per cwt

location adjustment.[43] Hence the holding in *Zuber*, invalidating "nea differentials, is not remotely relevant here.

The Secretary's discussion, as to a "refinement of the current p alignment among Zones 1, 8 and 9 by recognizing the nearest altern different sources of supply for Zones 8 and 9 and the proximity of such su areas to Zone 1 consumption centers" (Finding 5(kk)), merely recog changed production patterns, and the additional distances that milk mu transported to Houston, over the distance to Dallas (see Findings 5(hh)-(§ V, *supra*). That does not in any manner conflict with the holding in Z that producers located close to the market center cannot be paid mor their milk than producers located farther away. Hence the ALJ's relianc *Zuber* is totally misplaced.

Furthermore, the ALJ's views are inconsistent with the views of lea economists, who recognize that changes in location adjustments "need to into account not only changes in hauling costs, but also changes in the loc of production, processing plants and milk movements" (Economic Rese Service, U.S. Dep't of Agriculture, *Review of Existing and Alternative Fe Dairy Programs* 76 (Staff Report No. AGES840121) (Jan. 1984) (see § VI(A), *supra*). Furthermore, as explained in the Secretary's decision, i Secretary had not refined the alignment among Zones 1, 8 and 9 recognizing the nearest alternative different sources of supply, the loc adjustment for Zone 8 would have been 72¢ per cwt rather than 54¢ (Fi 5(hh); and see § V, *supra*).

In addition, as shown in § VI(A), *supra*, the leading agricul economists who are experts in dairy marketing recognize that an impo function of the Secretary under the Act is to establish and maintain a p alignment of prices between markets (Nourse Report at 9, 12-13; Adv Comm. Report at 5 (quoting Nourse Report); ERS Report to Congress a The courts have also recognized price alignment between markets as a consideration in determining changes in location adjustments. *Walus Block*, 719 F.2d 1414, 1415-20 (8th Cir. 1983) (§ VII(G), *infra*); *Borden v. Butz*, 544 F.2d 312, 313-19 (7th Cir. 1976) (evidence did not su Secretary's findings) (§ VII(E), *infra*); *Sunny Hill Farms Dairy Co. v. H* 446 F.2d 1124, 1127-30 (8th Cir. 1971) (§ VII(D), *infra*); *Fairmont Food v. Hardin*, 442 F.2d 762, 770-72 (D.C. Cir. 1971) (evidence did not su Secretary's findings) (§ VII(C), *infra*).

Finally, the ALJ's view, that the Secretary's power to change a loc adjustment, once it has been initially set, is less sweeping than his or

[43]As previously explained, in determining the amount of a location adjustment, the d milk has to be transported to a particular zone (e.g., Zone 8) is a key factor. Noneth location adjustment reflects an average situation of varying hauling costs and varying dis so it actually establishes the *location value* of milk delivered to a handler at a pa location. All producers, irrespective of where their farms are located, receive the same l adjustment because all milk delivered to the same location has the same location value

Similarly, Class I prices in Federal milk orders east of the Rocky Mountains are ba the Minnesota-Wisconsin price plus transportation costs from Eau Claire, Wisconsin (background material quoted from *Schepps*, at the outset of this decision, under the head *The Texas Marketing Order*"), even though the great bulk of the milk is produced local reflect higher transportation costs, Congress increased the Class I price differential in th order from $2.32 per cwt to $3.28 per cwt, in the Food Security Act of 1985 (§ IV, *sup*

power to promulgate the location adjustment, is a strange and novel doctrine, without any support in logic or in the terms of the Act (7 U.S.C. § § 608c(1), (17), (18)).

The Court in *Zuber* recognizes that terms in a milk order are limited to those expressly authorized by the Act. The Court states (396 U.S. at 183):

> The statute before us does not contain a mandate phrased in broad and permissive terms. Congress has spoken with particularity and provided specifically enumerated differentials, which negatives the conclusion that it was thinking only in terms of historical considerations. The prefatory discussion in the House Report emphasizes the congressional purpose to confine the boundaries of the Secretary's delegated authority. 16/ In these circumstances an administrator does not have "broad dispensing power." See *Addison v. Holly Hill Co.*, 322 U.S. 607, 617 (1944).

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16 "To eliminate questions of improper delegation of legislative authority raised by the decisions in *Schechter et al. v. United States*, the provisions relating to orders enumerate the commodities to which orders issued by the Secretary of Agriculture may be applicable, prescribe fully the administrative procedure to be followed by the Secretary in issuing, enforcing, and terminating orders, and specify the terms which may be included in orders dealing with the enumerated commodities." H.R. Rep. No. 1241, *supra*, at 8. See *Brannan v. Stark*, 342 U.S. 451, 465 (1952).

That holding poses no problems for the Secretary's decision here, since location adjustments are expressly authorized by the Act (§ III(D), *supra*).

B. *Blair v. Freeman*.

In *Blair v. Freeman*, 370 F.2d 229, 232-39 (D.C. Cir. 1966), the court held invalid the "nearby differential" provision of the New York milk order, since it "hinges not on the place of delivery, but on the location of the producer's farm" (370 F.2d at 236). That was the same type of nearby differential later invalidated in *Zuber v. Allen* (§ VII(A), *supra*). The court in *Blair v. Freeman* distinguishes the location differential in the order based on transportation costs, stating (370 F.2d at 234, 236, 237) (footnotes omitted):

> Relying on clause (c), the Secretary has incorporated in the Order three variables which he has generally denominated "location differentials": 13/ (a) One is a "transportation differential" precisely reflective of the terms of the Act, under which an amount per unit is added to or subtracted from the uniform minimum price payable to the producer varying with the place of the delivery to the handler. This is related to proximity of the delivery to the core of the market area, with consequent savings in transshipment costs. . . .
>
> . . . .

Although the Secretary of Agriculture called the nearby differential a "location differential," 22/ one of the price adjustment factors permitted under Section 8c(5)(B), the Act does not authorize variations premised on any difference in location whatsoever, but rather speaks of adjustments for "(c) the locations at which delivery of such milk is made * * *." Plainly, then, the regulation reflects an inconsistency with the terms of the Act, for the "nearby differential" hinges not on the place of delivery, but on the location of the producer's farm, and this is quite another matter. In this respect the nearby differential stands in eloquent contrast to the other differentials in the regulation that do depend on place of delivery, the transportation differential 23/ and the direct delivery differential. 24/

. . . .

Calling the nearby differential a "location" adjustment does not establish its permissibility. It clearly is not based on the location of delivery to the handler, the terms in which the Act speaks.

Nothing in *Blair v. Freeman* is contrary to the Secretary's position he Rather, the court's decision is supportive of a location adjustment, such that involved here, based on transportation costs to the location at wh delivery of milk is made to the handlers' plants.

C. *Fairmont Foods Co. v. Hardin*.

In *Fairmont Foods Co. v. Hardin*, 442 F.2d 762, 764-72 (D.C. Cir. 197 the court held invalid the location adjustment for the Nebraska-Western lo milk marketing order. Under the order, the Class I price applicable in t Eastern Zone was $1.40 per cwt plus the Minnesota-Wisconsin price, wit 15¢ per cwt increase in the Central Zone (M-W plus $1.55), and a 4 increase in the Western Zone (M-W plus $1.80). The Secretary justified t increased prices in the Central and Western Zones as a location adjustme based on two factors, (i) the need to reflect "'the cost of moving milk [to t Central and Western Zones] from the areas where supplemental supplies m be obtained' (*i.e.*, from the receiving station at Grand Island, in the Easte Zone, or from Minnesota and Wisconsin)," and (ii) "the need for a prop alignment of the uniform price with the prices of competing markets. T markets referred to are the Eastern Colorado and Black Hills areas, which a regulated under other Orders" (442 F.2d at 765).

Relying on *Zuber v. Allen* (§ VII(A), *supra*), the court held that a locati adjustment must compensate or reward the producer for providing economic service of benefit to the handler, stating (442 F.2d at 766 (footnotes omitted):

> In any milk order he was required to set uniform minimum prices payable to handlers subject to the order. He was authorized to make only certain adjustments and these were to "compensate or reward the

producer for providing an economic service of benefit to the handler [quoting from *Zuber v. Allen* (§ VII(A), *supra*)]." 19/

On judicial review, it is the function of the court to assure that the Secretary has set forth findings and reasons which fully justify any differential from the uniform price,--and justify them on the limited grounds permitted by Congress, which allow increases in minimum prices to reflect economic service of benefit to handlers. (It may be interpolated that the orders did not preclude handlers from entering into private contracts to pay their suppliers for additional benefits through prices higher than the minimum prices required by the Government's order.) The court must invalidate orders resting on any basis other than such economic reasons. . . .

The pertinent principles are appropriately developed by close attention to the Supreme Court's *Zuber* opinion. . . . The Court noted that the Congressional purpose behind allowing these differentials is "illumined by the character of the other statutory differentials for 'volume,' 'grade or quality,' 'location,' and 'production,' all of which compensate or reward the producer for providing an economic service of benefit to the handler." 22/ Since the Secretary failed to advance sufficient justification for the nearby differentials in terms of economic service of benefit to handlers, the Court concluded that they fell outside the scope of his authority and were therefore invalid.

The court further emphasizes that location adjustments must compensate producers for providing an economic service of benefit to the handler, stating (442 F.2d at 767) (note particularly the footnote, which is quoted with approval in other cases, in which there is a possible basis for misunderstanding unless the original thought expressed in this footnote is clearly understood):[44]

To summarize and emphasize, the regulatory scheme results in uniformity among the handlers covered by a milk marketing order, with additional economic burdens being permitted only for economic reasons, to "compensate or reward the producer for providing an economic service of benefit to the handler." *Zuber*, *supra*, at 184, 90. S.Ct. at 323. This is a sound objective of governmental regulation, and one which the courts are and should be vigilant to preserve. It is for that reason that *Zuber* requires the Secretary to demonstrate, as a prerequisite to imposing the burden of price differentials on handlers, that the burden is imposed for the purpose of reflecting an economic service of benefit to the handler. 23/

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[44]The footnote is relied on in *Sunny Hill Farms* (§ VII(D), *infra*) and *Schepps Dairy* (§ VII(F), *infra*).

23/ The Secretary argues, among other things, that the differentials set by this o are based on the "locations at which delivery * * * is made to * * * handlers," and fit within the literal definition of a location adjustment permitted by the Act. 7 U § 608c(5)(A)(3). We cannot agree, however, that a mere difference in locatio sufficient reason to require one handler to pay higher prices than another gove by the same Order. There must still be some relation between the price differe and economic benefit.

As to the first ground advanced by the Secretary in support of the l adjustments (the need to reflect hauling costs to deficit zones), the cou that substantial evidence does not support the Secretary's findings bec Nebraska, the basic movement of milk is from west to east--contrary general national movement westward from Wisconsin. The court stat F.2d at 767-70) (footnotes omitted):

> A. Contention of Justification in Terms of Deficits Within Nebra
>
> The first premise of Assistant Secretary Mehren for justificat of these differentials was that supplemental milk is needed in Central and Western Zones, at least in the months of short sup He found that the differentials in the Order reflect the cost of mov supplemental milk from the Eastern Zone to the Central and West Zone plants, and also reflect the incremental cost of these zones, o and above the Eastern Zone, in receiving imports from Minnesota Wisconsin. 24/
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> . . . .
>
> Thus the Agriculture officials painted Western and Cent Nebraska as an area of short milk supply. When we study the rec it becomes plain that whereas the national pattern for milk include volume moving west from Minnesota-Wisconsin, within the state Nebraska the basic pattern of milk supplies is from west to east--a ki of localized cross-current that is traverse to the national movement milk westward from Wisconsin. The Secretary may take account large trends and flows when formulating regulatory policies. Whe however, the specific area covered by a local milk marketing orde fairly characterized by a different trend, the regulation and justification must take full account of the local movement.
>
> . . . And while raw milk is imported into Nebraska from Minnesota-Wisconsin complex, 25/ the exhibits in the record of promulgation hearing show that within Nebraska itself the domin movement of raw milk is eastward from the Central and West Zones (sometimes referred to together as the "western zones"), a there is no significant movement of milk westward to these west zones.
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> . . . .

> . . . The basic movement in Nebraska, however, remains eastward.29/
>
> . . . .
>
> . . . In short, the Eastern Zone of Nebraska is a deficit area. The Department's conclusion that the western zones are a deficit area is not only unsupported by any data isolating demand and supply for the western zones,--an omission which, in context, is not without importance,--but is simply not supported by any substantial evidence whatever in the record before the court.
>
> If there is a slight deficit in the western zones on occasion, due to the Coop's desire to take advantage of the higher Colorado prices, that does not warrant deviation from the uniform price payable by handlers, which the Act contemplates as the norm for milk marketing orders. For these exceptional situations, the Western and Central Zone handlers can pay higher prices on a private contract basis. But there is no reason to impose on these handlers a requirement to pay a higher premium price all year around, and thereby put them at a severe disadvantage vis-a-vis their competitors handling milk in the Eastern Zone, on the theory that there is a general westward milk movement in Nebraska, when in fact the predominant movement in Nebraska is eastward. 31/

The court's decision as to the Secretary's first point in *Fairmont Foods* does not detract at all from the Secretary's position here. It is undisputed that Zone 8 (Houston/Beaumont) is an extremely deficit zone (importing almost 90% of its milk), that the great bulk of the milk needed in Zone 8 must be transported a substantial distance from the supply areas of Texas to Zone 8 (with over half of Zone 8's milk transported more than 251 miles), and that the location adjustment does not exceed the cost of transporting the milk to Zone 8 (see § III(A), (B), *supra*).

After holding that the "Secretary's first ground of decision is not supported by substantial evidence on the record," and that "the finding cannot be allowed to stand" (442 F.2d at 770), the court then proceeds to hold invalid the Secretary's second reason in support of the differentials (price alignment). A careful examination of the court's decision as to the second ground demonstrates that it is entirely irrelevant to a location adjustment such as the one involved here, i.e., one compensating producers for providing an economic service of benefit to handlers, considering the location at which the milk is delivered to the handlers.

The court makes it clear, in considering the Secretary's second ground (price alignment), that it is not a location adjustment based on the location at which milk is delivered *to* the handler but, rather, an attempt to align prices between orders based upon *distribution patterns* of the *finished* product *by* the handler. The court states at the outset of its discussion of the Secretary's second ground (442 F.2d at 770):

B. Contention of Relationship to Colorado Milk Order

> This brings us to the second ground of the Secretary's decision, that price differences, when prices are compared to those set in orders for adjacent regions, necessitate the imposition of price differentials in the Nebraska order in order to avoid serious disruptions in the markets of adjoining regions. As contrasted with his first ground of decision, the Secretary here is focusing not on the distribution of raw milk to the handler, but rather the marketing of the finished product by the handler.

The court then explains that, even if it agreed with the Secretary's second ground, it would still have to remand the proceeding to see if the Secretary would have adopted that regulatory measure if he knew that his first ground was invalid (442 F.2d at 770-71). However, the court did not have to "pause long over the problem, since we find that the Secretary's second ground, like the first, is unsupported by the record" (442 F.2d at 771).

The court notes that it is particularly important for substantial evidence to support the Secretary's findings on the second ground, because it is a broad remedy imposing a charge on all handlers in the Central and Western Zones, whether or not they market milk in Colorado, while the Secretary could have handled the same problem by requiring Colorado handlers to pay a compensatory charge on milk purchased from the Nebraska-Western Iowa marketing area. The court states (442 F.2d at 771) (footnote omitted):

> The requirement of substantial evidence supporting salient findings is particularly important here, where the Secretary has chosen a broad rather than refined remedy as a means of solving the alleged problem of market disruptions in Eastern Colorado. In seeking to handle this problem through the Nebraska-Western Iowa Order, the Secretary has imposed the burden of higher prices on all handlers receiving milk within the Central and Western Zones, whether or not they intend to market that milk in Colorado. As an alternative, the Secretary could have added to the Eastern Colorado Order a requirement that handlers pay a compensatory charge on all milk purchased from producers outside the area and marketed within it. In that case the handlers would have had to bear the burden only if and when they entered the Colorado markets. 32/
>
> . . . .
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> . . . But we do think that his use of a requirement that is more burdensome and less refined than an available alternative requires very careful scrutiny of the evidence relied on as a basis for his findings. "[T]he use of a sweeping rather than a more refined administrative remedy may, at least in some instances, represent an improvident use of administrative discretion, in the absence of stated justification. Burlington Truck Lines v. United States, 371 U.S. 156, 173-174 . . . (1962)."

The court then held that mere speculation that market disruption might occur in an Eastern Colorado market without the increased charges in the Central and Western Zones of the Nebraska-Western Iowa marketing order would not justify the higher charges, particularly in view of the more refined alternative of imposing a compensatory payment provision in the Colorado order. The court states (442 F.2d at 772):

> Assuming that the Nebraska-Western Iowa Order is a proper vehicle for remedying market disruptions in the Eastern Colorado market, there must be substantial evidence of such disruption in order to justify the imposition of such price differentials for this purpose. Mere speculation is no warrant for deviating from a principle as paramount as that of uniform price structure within a single order, particularly where the Secretary has other techniques available.

Significantly, the court's views just quoted do not hold, or even suggest, t if the Secretary had prevailed on his first ground, i.e., that the location istment was necessary to compensate producers for providing the economic rice of shipping milk to handlers in a deficit area, the Secretary would also e to show that the location adjustment would prevent market disruptions respect to another area. Moreover, the court expressly limits its holding- t mere speculation as to future market disruptions is inadequate--to itions "where the Secretary has other techniques available" (442 F.2d at . Hence the foregoing quotation is totally inapplicable to the Secretary's sion at issue here.

he court then held that the Secretary's second ground for decision (price ment) is not supported by substantial evidence because there was very milk sold by Nebraska handlers in Colorado, while many Colorado lers sold milk in Nebraska. There is nothing in the record to support the ence that there would be movements of processed milk from western aska to eastern Colorado when these movements had not previously red and, in fact, prior movements were in the opposite direction. The states (442 F.2d at 772):

> We can find no basis for the Secretary's findings beyond mere eculation, and therefore conclude that his second ground of decision, e the first, must fail. The crucial fact emerging from the testimony the promulgation hearing is that while there was very little milk sold Nebraska handlers in Colorado, Colorado handlers accounted for ubstantial share of milk marketing in western Nebraska. Mr. Grant, r example, testified that he knew of no sales by any Nebraska ndlers in Colorado, except for Fairmont's small contract with the erling, Colorado, public schools. (Tr. 232-33). On the other hand, r. Grant estimated that 3 out of 10 handlers operating in the estern Zone of Nebraska, were regulated under the Eastern lorado Order. (Tr. 52-3). Mr. Davidson, who also testified in favor the Order, stated that Colorado handlers, specifically Beatrice,

Safeway, and Borden were selling in western Nebraska. In fact he admitted that the "only area of competition * * * between eastern Colorado handlers and those regulated under the present Nebraska-Western Iowa order would be in the [Nebraska] panhandle area." (Tr. 269).

> The Secretary does not deny these facts, and attempts to cope with them by arguing that he should be allowed to prevent market disruption before it actually occurs. Administrative and executive expertise certainly encompasses some powers of prediction not shared by those less familiar with the intricacies of the particular field, but such powers, like any others, must be justified by reference to objective evidence. There must be a rational basis of record for invoking the concept of a preventative remedy. We think that the Secretary failed to meet that standard. The record offers nothing but generalizations of broad westward movements, and these do not support the inference that there will be specific movements of processed milk from western Nebraska to eastern Colorado when these have not taken place in the past, and indeed the movement has gone from Colorado to western Nebraska. Assuming that intra-Order differentials may constitute a proper means of dealing with dislocations between western Nebraska and eastern Colorado, there was insufficient need in this case for their application.

That reasoning is not applicable here. The failure of the Texas order to compensate producers for the economic service of transporting milk to the deficit area (Zone 8), under the 36¢ location adjustment previously in effect, is not disputed (§ III(A), *supra*). The inequities between producers and handlers had already occurred (§ VI(B)(1), (2)), resulting in disorderly marketing conditions that had already occurred (§ VI(B)(3)). In addition, as shown in § VI(B)(4), *supra*, the Secretary's findings and conclusions as to attracting milk to Zone 8 and the possible threat to Zone 8's milk supply (because of order prices that fail to reflect transportation costs, and disorderly marketing conditions) are not based on mere speculation, but, rather, (i) reflect the Secretary's awareness of his statutory duty to fix *order prices* that guarantee that milk will be attracted to a deficit area (without relying on over-order premiums), and (ii) are consistent with the views of leading dairy marketing experts. Hence nothing in *Fairmont Foods* is adverse to the Secretary's decision in the present proceeding.

D. *Sunny Hill Farms Dairy Co. v. Hardin*.

In *Sunny Hill Farms Dairy Co. v. Hardin*, 446 F.2d 1124, 1125-31 (8th Cir. 1971), *cert. denied*, 405 U.S. 917 (1972), the court sustained a location adjustment that applied to only one handler under the St. Louis, Missouri, milk marketing order. On its face, the order increased the price that handlers had to pay in three southern counties, but no handlers were located in two of those counties, and only one handler, Sunny Hill Farms Dairy Co. (Sunny Hill), was located in the third county, Cape Girardeau County, approximately 120 miles south of St. Louis. The location adjustment increased the cost of

Sunny Hill's milk by 15¢ over that paid by St. Louis handlers (446 F.2d at 1126).

The Secretary's decision explains that milk in the Cape Girardeau area, south of St. Louis, has a higher location value than milk in St. Louis, and that a higher price "appears necessary to assure an adequate supply for plants in the area, and also provide for better alignment of prices between orders" (446 F.2d at 1126).

The district court held that the location adjustment was invalid, in part, because only one handler was singled out for regulatory action. The court of appeals quotes the following language from the district court (446 F.2d at 1128, 1130):

> ". . . There is no rational basis for singling out plaintiff as the only handler in the entire marketing area to be a buffer between marketing areas when it is undisputed that 69% of its sales are in the St. Louis marketing area. * * *"
>
> . . . .
>
> "* * * There is no reasoned basis for separating out and distinguishing plaintiff from all other regulated handlers in the St. Louis marketing area. * * *"

On appeal, the court of appeals held that the Secretary has the statutory right to impose the location adjustment applicable to a single handler for the reasons advanced in the Secretary's final decision. The court of appeals distinguished *Zuber v. Allen* (§ VII(A), *supra*) on the grounds that the market differential involved in *Zuber* was not based on the location at which delivery of milk was made to the handler, but, rather, was based on the location of the producer's farm, and the nearby differential did not have as a purpose providing compensation to producers for rendering an economic service to handlers (446 F.2d at 1128-29).

The court of appeals also distinguished *Fairmont Foods Co. v. Hardin* (§ VII(C), *supra*) on the grounds that, in *Fairmont Foods*, "there was no support in the record for the Secretary's finding that higher prices were necessary to reflect the cost of moving milk from east to west" since "the basic movement of milk in the Nebraska marketing area was from the west to the east" (446 F.2d at 1129). The court also noted that, in *Fairmont Foods*, "there was no support in the record for the Secretary's finding that the higher price in the central and western zones was necessary to avoid serious disruption of the eastern Colorado marketing area" (446 F.2d at 1129).

The court noted that Sunny Hill did not challenge the adequacy of the evidence to support the Secretary's conclusions that the location adjustment was necessary to maintain a sufficient supply of milk in the Cape Girardeau area, and that the 15¢ differential was necessary to align the Cape Girardeau prices with those in Memphis, Tennessee (446 F.2d at 1129-30). Since Sunny Hill sold 19% of its milk in the Memphis area, Sunny Hill would have a competitive advantage over Memphis handlers in the absence of the location

adjustment. The court held that the competitive relationship between Sunny Hill and Memphis handlers was a problem that could be considered by the "Secretary of Agriculture, who has the responsibility for carrying out the broad purposes of the legislation" (446 F.2d at 1130).

The court then engages in a discussion of *Fairmont Foods* which, unless carefully analyzed, can be misunderstood as imposing a burden on the Secretary to justify a location adjustment on the basis of "broad purposes" of the Act *other* than the purpose of compensating producers for providing an economic service of benefit to handlers. The court quotes note 23 from *Fairmont Foods* (see text accompanying note 44, § VII(C), *supra*), which recognizes that a mere difference in location is not a sufficient reason to require a handler to pay higher prices than others unless there is "some relation between the price differential and economic benefit" (446 F.2d at 1130). After quoting that footnote from *Fairmont Foods*, the court expresses *agreement*, stating (446 F.2d at 1130) (emphasis added) (footnote omitted):

> The *Fairmont* Court stated in a footnote:
>
> "The Secretary argues among other things, that the differentials set by this Order are based on the 'locations at which delivery . . . is made to . . . handlers,' and thus fit within the literal definition of a location adjustment permitted by the Act. 7 U.S.C. § 608c(5)(A)(3). We cannot agree, however, that a mere difference in location is sufficient reason to require one handler to pay higher prices than another governed by the same Order. There must still be some relation between the price differential and economic benefit."
>
> Fairmont Foods Company v. Hardin, *supra* at 767, n. 23.
>
> We *agree* [with *Fairmont*, note 23] that a differential is not a location differential within the meaning of the Act simply because the Secretary calls it one. We also *agree* [with *Fairmont*, note 23] that the Secretary is not free to establish a differential for every location at which milk is delivered to a handler. He always has the additional burden of establishing that the differential is, in fact, based upon the handler's location and that it is required to accomplish the broad purposes of the Act. We feel that the Secretary has borne both of these burdens here. 5/

Since the court in *Sunny Hill* is agreeing with note 23 in *Fairmont Foods* and note 23 in *Fairmont Foods* is stated at the conclusion of a length argument in *Fairmont Foods* explaining that a location adjustment must b imposed for the purpose of reflecting an economic service of benefit to th handler, nothing in *Sunny Hill* should be construed as disagreeing with the analysis in *Fairmont Foods*. Specifically, when the court in *Sunny Hill* state that the Secretary has the burden of establishing that the location adjustmen "is required to accomplish the broad purposes of the Act," it is sufficient t show that the location adjustment accomplishes the broad purpose o rewarding producers for providing an economic service of benefit to handle

by delivering milk to a particular location. It is not necessary for the Secretary to show, in addition, that the location adjustment accomplishes some other broad purpose of the Act, e.g., price alignment with other orders or areas.

Finally, the court held that even though the order makes it less profitable for Sunny Hill to compete in the St. Louis area, it is not an economic trade barrier prohibited by 7 U.S.C. § 608c(5)(G). The court states (446 F.2d at 1131):

> The order promulgated by the Secretary obviously does not prohibit Sunny Hill from marketing milk purchased by it in the St. Louis area or, for that matter, in the Memphis or Paducah areas. The order does make it less profitable for Sunny Hill to sell in the St. Louis market than it would be were Sunny Hill not required to pay its producers the fifteen-cent differential. But the differential is specifically authorized by the Act and reasonable under the circumstances of the case. It thus cannot be construed as establishing an illegal trade barrier. If all location differentials were to be so construed, nothing would be left of the Secretary's power to promulgate milk marketing orders.

To summarize, nothing in *Sunny Hill* is adverse to the Secretary's position here and, to the contrary, *Sunny Hill* is supportive of the Secretary's position here. Specifically, *Sunny Hill* shows that a location adjustment can be made applicable even to a single handler, which puts that handler at a competitive disadvantage in marketing milk in certain areas. In addition, *Sunny Hill* shows that a location adjustment can be imposed to recognize the higher location value of the milk, to assure an adequate supply for plants in the area of the location adjustment, and to better align prices between orders.

Although the evidence to support the Secretary's findings in *Sunny Hill* was not challenged on appeal, it should be noted that there was no evidence of an overall shortage of milk in the Cape Girardeau area. The evidence showed only that, historically, Sunny Hill had paid approximately 15¢ more per cwt above the minimum St. Louis price for its milk. *Sunny Hill* shows that a finding can be made that a location adjustment is necessary to assure an adequate supply for plants in an area in the absence of evidence showing that there is, or will be, an overall shortage of milk in the area, or that there is, or will likely be, disorderly marketing conditions.

E. *Borden, Inc. v. Butz.*

In *Borden, Inc. v. Butz*, 544 F.2d 312, 313-19 (7th Cir. 1976), reversi *Borden, Inc. v. Butz*, No. 74 C 2533 (N.D. Ill. Feb. 11, 1976), *printed in* : Agric. Dec. 1503 (1976), which had affirmed *In re Borden, Inc.*, 33 Agric. De 998 (1974), the court held invalid three actions by the Secretary concerning th Quad Cities-Dubuque milk marketing order (Order No. 63) which increase (initially by 19¢ and then by an additional 15¢) the price per cwt required t

be paid by Borden for milk delivered to its Des Moines, Iowa, plant.[45] If the regulatory action involved in *Borden*, and the Secretary's decision involved in the present case, are not fully understood, portions of the court's opinion seem somewhat adverse to the Secretary's position here. But if both are fully understood, nothing in *Borden* is contrary to the Secretary's position here.

Before beginning a necessarily tedious discussion of *Borden*, I should state at the outset that, although *Borden* involved a location adjustment, the factual situation was atypical--far removed from the facts here. The Secretary's amendatory action involved in *Borden* was admittedly directed solely at making Borden pay the same price for milk at its Des Moines, Iowa, plant after its Des Moines plant became regulated under the Quad Cities-Dubuque order (Order No. 63), as it paid when it was previously regulated under the Des Moines order (Order No. 79).

Prior to September 1, 1970, Borden had a plant at Rock Island, Illinois, regulated under the Quad Cities-Dubuque order (Order No. 63). It served only the Quad Cities-Dubuque marketing area. Borden also had a plant at Des Moines, Iowa, regulated under the Des Moines, Iowa, order (Order No. 79), which, before and after September 1, 1970, served the Des Moines marketing area (Order No. 79), the Quad Cities-Dubuque marketing area (Order No. 63), and the marketing areas of Cedar Rapids (Order No. 70), North Central Iowa (Order No. 78), Greater Kansas City (Order No. 64), Nebraska-Western Iowa (Order No. 65), and nonregulated areas (544 F.2d at 313). The Quad Cities- Dubuque Class I price was 15¢ lower than the Des Moines Class I price before and after September 1, 1970, i.e., the Des Moines Class I price was M-W plus $1.45, and the Quad Cities-Dubuque Class I price was M-W plus $1.30.

Borden closed its Rock Island plant on September 1, 1970, and its Quad Cities-Dubuque customers were thereafter served from Borden's Des Moines plant, resulting in Borden's Des Moines plant becoming regulated under the Quad Cities- Dubuque order rather than the Des Moines order, under which it was previously regulated. The change in regulation occurred because the greater part of Borden's milk processed at its Des Moines plant was distributed in the Quad Cities-Dubuque area, and both orders provided that a plant is regulated in the market where it has the greatest distribution.

After Borden became regulated under the Quad Cities-Dubuque order, Borden distributed less than one-third of the milk from its Des Moines plant in the Des Moines area (33 Agric. Dec. at 1028). The "volume of milk distributed from the Borden, Inc. [Des Moines], plant in the Quad Cities-Dubuque, Des Moines, and Greater Kansas City markets is nearly the same for each market" (33 Agric. Dec. at 1011; 35 Fed. Reg. 16,475, 16,476 (1970)). Hence Borden transported less than one-third of its milk in packaged form to the Quad Cities-Dubuque area.

[45]Following the court of appeals decision, the case was remanded to the ALJ to determine Borden's damages, on the basis of the equities of the situation. In re Borden, Inc., 38 Agric. Dec. 1061 (1979), dismissed, 40 Agric. Dec. 1711 (1979) (pursuant to a settlement agreement).

During the period September 1-30, 1970, when Borden was operating only its Des Moines plant,[46] Borden paid the Quad Cities-Dubuque Class I price ($1.30), less a minus 19¢ per cwt location adjustment (that was in effect to lessen the price to handlers receiving lower valued milk at a "distant" location, far removed from the Quad Cities-Dubuque consumption center (see §§ II, III(D), *supra*)). Hence Borden paid M-W plus $1.11 for all of its Class I milk at its Des Moines plant ($1.30 - $.19 = $1.11), even though less than one-third of the milk was, in fact, transported by Borden to the Quad Cities-Dubuque area. This was 34¢ per cwt less than Borden had been paying for milk at the Des Moines plant when it was regulated under the Des Moines order ($1.45 - $1.11 = $.34).[47]

In other words, when Borden became regulated under the Quad Cities-Dubuque order, Borden's Des Moines plant got the benefit of the lesser location-value Class I price of the Quad Cities-Dubuque order (M-W plus $1.30), while other Des Moines plants regulated under the Des Moines order paid the higher location-value Class I price of the Des Moines order (M-W plus $1.45), and, "to add insult to injury," the lesser Quad Cities-Dubuque Class I price *for all Borden's milk* was reduced an additional 19¢ per cwt under the Quad Cities-Dubuque location adjustment, as if Borden were receiving milk at a distant country supply plant (Des Moines), and would have to incur the added hauling expense of transporting the packaged milk back to the consumption center (Quad Cities-Dubuque), when, in fact, Borden's Des Moines plant was not in the nature of a distant, country receiving plant vis-a-vis the Quad Cities- Dubuque consumption center, and Borden hauled less than one-third of its packaged milk back to the Quad Cities-Dubuque consumption center.

Prior to (and during) September 1970, the location adjustment under the Quad Cities-Dubuque order (paragraph (2) of which reduced Borden's Des Moines price by 19¢) provided (7 C.F.R. § 1063.52 (1970)):

> § 1063.52 Location adjustments to handlers.
>
> (a) For milk received from producers at a pool plant and disposed of as Class I milk or assigned Class I location adjustment credit pursuant to paragraph (b) of this section and for other source milk for which a location adjustment is applicable, the [Class I] price specified in § 1063.50(b) [M-W plus $1.30] shall be reduced as follows:

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[46] To avoid irrelevancies, I am ignoring Borden's plants in other areas not involved in *Borden*.

[47] Borden voluntarily paid its new sole-supplier, Mississippi Valley Milk Produce Association (Mississippi Valley), an additional 15¢ per cwt on all milk distributed in the D Moines marketing area (33 Agric. Dec. at 1098-99), which was less than one-third of its tot volume. (Before September 1, 1970, Borden had purchased its milk at Des Moines fro another cooperative, Mid-America Dairymen, Inc. (Mid-America)). But even with the volunta 15¢ payment on milk distributed in the Des Moines area, Borden had a 19¢ advantage ov other Des Moines handlers as a result of the 19¢ location adjustment.

(1) At a plant in Dubuque and Jackson Counties, Iowa, and East Dubuque, Ill. by 10 cents; and

(2) At a plant located outside the marketing area and 70 miles or more, by the shortest hard-surfaced highway distance as determined by the market administrator, from the nearer of the City Hall, Rock Island, Ill., or the Post Office, West Liberty, Iowa, by 10 cents and by an additional 1.5 cents for each 10 miles or fraction thereof that such distance exceeds 80 miles.[48]

Effective October 1, 1970, the Secretary temporarily suspended par: (2) of the Quad Cities-Dubuque location adjustment (for the mo October only), thereby eliminating Borden's minus 19¢ location adjus but not its competitors' minus 10¢ location adjustment under paragra The temporary suspension action was taken without a hearing (but with provided for written comments), and was at the request of Mid-Americ cooperative that had previously supplied Borden at Des Moines. Secretary said that the suspension was necessary because, otherwise, a Cities-Dubuque order regulated plant located in Des Moines (description fit Borden only) would have a 34¢ advantage over othe Moines order regulated plants located in Des Moines, which would d competitive relationships between Borden and other Des Moines plant would also threaten orderly marketing in other neighboring markets milk is distributed by Borden. Further, the Secretary said that it i reasonable to expect producers to continue to deliver milk to Borden higher prices are available elsewhere. Specifically, the Secretary state Fed. Reg. 15,632 (1970)):

The Class I price under the Des Moines order is 15 cents high than the Quad Cities-Dubuque Class I price.

The location adjustment provisions would reduce the Quad Citie Dubuque Class I and uniform prices 19 cents at a plant located in Dc Moines. In this circumstance, a Quad Cities-Dubuque order regulate plant located in Des Moines would have a Class I price 34 cents belo the Class I price applicable at a plant so located and regulated unde the Des Moines Federal order.

Such price disparity as between a Quad Cities order plant and Des Moines order plant located in the Des Moines marketing are would disrupt competitive relationships among such handler distributing milk in that market. Moreover, it also would threate orderly marketing in several neighboring markets, such as Kansas City

[48]Des Moines is approximately 140 miles from the Quad Cities-Dubuque order base which is 60 miles more than the 80-mile reference in paragraph (2). Accordingly, Bor minus location adjustment was 10¢, plus six 10-mile units computed at 1.5¢ per unit (6 = 9¢), or a total of 19¢ (10¢ + 9¢ = 19¢) (544 F.2d at 313-14).

where milk is distributed from the Borden, Inc., plant at Des Moines.

> . . . Should the Borden, Inc., plant be regulated under the Quad Cities order for September, the minimum Class I price payable to producers at such plant will be substantially below such price under the Des Moines order as well as under neighboring orders supplied by producers in the region. In such circumstance it is not reasonable to expect producers to continue to deliver milk to the Borden, Inc., plant while higher prices are available to them at most other regulated plants in the region, including those located in the Quad Cities-Dubuque marketing area.[49]

Borden was, in fact, regulated under the Quad Cities-Dubuque order in October 1970. With the suspension of the minus 19¢ location adjustment, Borden paid the Quad Cities-Dubuque Class I price (M-W plus $1.30) during the month of October 1970. (33 Agric. Dec. at 1009-10).

Effective November 1, 1970, following a hearing, the Secretary allowed paragraph (2) of the Quad Cities-Dubuque location adjustment to become effective again for all handlers except Borden (which the Secretary knew was the only Quad Cities-Dubuque regulated handler with a plant in Des Moines). This permanently eliminated Borden's minus 19¢ location adjustment. At the same time, and also effective November 1, 1970, the Secretary temporarily added (until April 30, 1971) a plus 15¢ location adjustment applicable only to Borden's Des Moines plant. The location adjustment provisions of the Quad Cities-Dubuque order effective November 1, 1970, were as follows (7 C.F.R § 1063.52 (1971) (emphasis added)):

> § 1063.52 <u>Location adjustments to handlers.</u>
>
> (a) For milk received from producers at a pool plant and disposed of as Class I milk or assigned Class I location adjustment credit pursuant to paragraph (b) of this section and for other source milk for which a location adjustment is applicable, the [Class I] price specified in § 1063.50(b) [M-W plus $1.30] shall be adjusted as follows:
>
> (1) At a plant in Dubuque and Jackson Counties, Iowa, and East Dubuque, Ill., subtract 10 cents;
>
> (2) At a plant located outside the marketing area <u>and outside the Des Moines, Iowa, marketing area as specified in Part 1079</u> [Borden was the only handler excluded by the emphasized language] and 70 miles or more, by the shortest

[49]This last sentence of the Secretary's decision as to the temporary action was found by t court of appeals to be unsupported by evidence (544 F.2d at 316-17). Of course it w unsupported by evidence! No hearing was held! As shown below, only a very minor comme in this respect was made by the Secretary after a hearing was held.

hard-surfaced highway distance as determined by the market administrator, from the nearer of the City Hall, Rock Island, Ill., or the Post Office, West Liberty, Iowa, subtract 10 cents and subtract an additional 1.5 cents for each 10 miles or fraction thereof that such distance exceeds 80 miles; and

(3) During the period November 1, 1970, through April 1971 at a plant located within the Des Moines, Iowa, marketing area [Borden was the only Quad Cities-Dubuque regulated handler so located], add any amount [i.e., 15¢] by which the [Class I] price specified in [Quad Cities-Dubuque] § 1063.50(b) [M-W plus $1.30] is less than the applicable Class I price at the same location pursuant to Part 1079 regulating the handling of milk in the Des Moines, Iowa, marketing area [M-W plus $1.45].

With the removal of the minus 19¢ location adjustment (for Borden only), and the substitution of a plus 15¢ location adjustment (for Borden only), beginning November 1, 1970, Borden paid the Quad Cities-Dubuque Class I price (M-W plus $1.30), and the plus 15¢ location adjustment, for a total of M- W plus $1.45. That was 34¢ per cwt more than it had paid in September 1970, before the Secretary's amendatory action, and the same price Des Moines order regulated plants, which had plants in Des Moines, paid for their milk.

The Secretary's final action challenged in *Borden* terminated the opening language of the 15¢ plus location adjustment language (paragraph (3) quoted above) applicable to Borden only, i.e., "During the period November 1, 1970, through April 1971," thus making permanent the 15¢ plus location adjustment applicable to Borden only. (Borden closed its Des Moines plant on July 31, 1971.)

The Secretary had a lengthy explanation for his actions involved in *Borden* (33 Agric. Dec. at 1009-14). His actions were upheld by (i) the Department's Chief Administrative Law Judge (whose expertise prior to becoming an ALJ was in the field of milk orders), (ii) the Department's Judicial Officer (who had briefed and argued milk cases for 10 years, and decided milk cases for 2 years), and (iii) the reviewing district judge. It was invalidated by two circuit judges and one court of claims judge (sitting by designation).

Although I have not changed my views as a result of the court of appeals decision, the factual setting in *Borden* was quite different from that involved here. The Secretary in *Borden* changed the location adjustment provisions of the Quad Cities-Dubuque order so that Borden's Des Moines plant would continue to pay the same price for milk (M-W plus $1.45) as it did when it was regulated under the Des Moines order (Order No. 79), without any minus location adjustment. The Secretary's action was taken primarily (1) to prevent abrupt changes in minimum prices to producers if a slight shift in Borden's distribution pattern resulted in a change in the order under which Borden was regulated, (2) to recognize that the economic value of milk is affected not only by transportation costs, but, also, by alternative outlets available to the producers, and (3) to prevent Borden from having a Class I price advantage over other Des Moines handlers regulated under the Des Moines order. The

Secretary stated in his justification for the November 1, 1970, action, following a hearing (35 Fed. Reg. 16,475, 16,476-77 (1970); 33 Agric. Dec. at 1011-12):

> The location adjustment provisions of the Quad Cities-Dubuque order reduce the Class I price by 19 cents at a plant located in Des Moines. The Des Moines order Class I price is 15 cents higher than the Quad Cities-Dubuque order Class I price. In this circumstance, a Quad Cities-Dubuque order regulated plant located in Des Moines would have a Class I price 34 cents below the Class I price applicable at a plant so located and regulated under the Des Moines order.
>
> . . . In September distribution of fluid milk from the [Borden Des Moines] plant on routes in the Quad Cities-Dubuque marketing area exceeded the volume distributed on routes in the Des Moines marketing area. There is also substantial distribution from this plant in the Greater Kansas City and North Central Iowa Federal order marketing areas. The plant meets the pool distributing plant qualification provisions of the orders for each of these markets. Under the terms of the orders, however, a plant is regulated in the market where it has the greatest distribution, which for September was the Quad Cities-Dubuque market in the case of this plant.
>
> The volume of milk distributed from the Borden, Inc., [Des Moines] plant in the Quad Cities-Dubuque, Des Moines, and Greater Kansas City markets is nearly the same for each market. . . . In this circumstance, with a relatively small change in the sales volume from the [Borden Des Moines] plant in the Quad Cities- Dubuque, Des Moines, or Greater Kansas City markets, regulation of the plant could shift from one order to another.
>
> . . . .
>
> Such shifts in regulation of plants among the orders results in abrupt changes in minimum prices to dairy farmers who supply such plants when the Class I prices applicable at such plant locations differ among the orders. It also disrupts competitive Class I price relationships among handlers similarly located but regulated under different orders [e.g., without the amendatory action, Borden would have a 34¢ price advantage over Des Moines handlers regulated under the Des Moines order]. This is the case for a Des Moines located plant [Borden] as between the Des Moines and Quad Cities orders. . . .
>
> Location adjustments reasonably should reflect the cost associated with distance in moving milk from outlying supply plants to the central market for fluid processing and disposition. [That is recognized in the legislative history of the Act (§ III(D), *supra*), and was the basis for the minus location adjustment provisions in the Quad Cities-Dubuque

order prior to October 1, 1970.] In some instances, however, the economic value of the milk to the producer at a particular location will be affected not only by transportation cost to move the milk to a regulated plant under one order, but also by the price he can obtain by shipping to an alternative market [, i.e., without the amendatory action, producers would obtain 34¢ per cwt more from a Des Moines order regulated handler with a plant in Des Moines than from a Quad Cities-Dubuque order regulated handler with a plant in Des Moines.] Unless the [latter] is taken in account, the milk so located may not be available to the former plant.[50]

. . . .

The area of greatest density of supply for the Quad Cities market is in the vicinity of Delaware and Dubuque Counties, Iowa. Milk from farms in these two counties accounted for about 40 percent of the supply on the market or about 12 million pounds of milk per month. Much of this supply is now being moved by the cooperative association to Des Moines, about 150 miles away, rather than to Rock Island, Ill., about 100 miles away.

Because of the greater hauling distance the cooperative is obviously incurring a greater transportation cost in furnishing a supply of milk from such area to Borden, Inc., at its Des Moines plant than it incurred in moving milk from such area to the Rock Island plant.

In this circumstance it is not reasonable to price milk to a Quad Cities regulated plant at the Des Moines location at a minimum Class I price lower than the Class I price applicable at plants in such market regulated under the Des Moines order, since the Des Moines regulated plants represent a higher valued outlet for milk delivered to a similar location. . . .

Under the marketing circumstances related above it is concluded that orderly marketing will be enhanced by amending the Quad Cities-Dubuque order location adjustment provisions to provide the Des Moines Class I price level at plants located in the Des Moines marketing area, and to provide corresponding adjustments to the uniform prices to producers delivering milk to such plants.

. . . .

All interested persons who participated in this proceeding indicate that there is a need to consider the matter of the appropriate Class I

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[50]This minor comment that milk "may not be available" to Borden is the only comment by the Secretary, in this respect, in his final decision. The Secretary's earlier, much stronger comment (see note 49) was blown up by the court of appeals out of all proportion, and regarded by the court as the first of two economic justifications supposedly advanced by the Secretary for his final actions.

> price differential for the Des Moines order relative to several neighboring orders. But since most persons urge that it be done at a hearing of broader scope, it is concluded that the proposal [by Borden] to reduce such differential by 15 cents should not be adopted on the basis of this record.[51]

Since the court of appeals missed the mark by such a wide margin in understanding the basis for the Secretary's challenged actions in *Borden*, and in dealing with the Secretary's concerns as to the disruptive competitive relationships that would have occurred in the absence of the Secretary's action, it is helpful to further analyze the situation, before discussing the court's decision.

The location adjustment provisions which gave Borden the benefit of a minus 19¢ location adjustment during September 1970 were originally put into the Quad Cities order to recognize the lesser value that milk delivered to a country plant has over milk delivered to nearby plants in the Quad Cities area, in view of the increased transportation costs incurred by the handler when he transports the milk from the country plant to the Quad Cities marketing area. (This is the exact type of situation discussed in the legislative history of the Act (§ III(D), *supra*)). Specifically, the Secretary stated in the final decision with respect to the original Quad Cities location adjustment (22 Fed. Reg. 2763, 2768 (1957)):

> At the present time, all handlers are required to pay the same minimum class prices for milk received from producers regardless of the location of the pool plant at which the milk is received. Consequently, milk received at a supply plant and moved to a plant in the marketing area for processing and packaging may be expected to be more costly to a handler than milk received directly from producers at his processing plant in the marketing area. . . .
>
> . . . The value of milk to the market for fluid purposes is greater at the location of a plant in the marketing area which packages it for distribution than at a country plant in the production area from which milk must be moved to the city plant for processing and packaging.

[51] On April 7 and 9, 1971, a notice of hearing was issued to consider, *inter alia*, the Class I price differentials for a number of orders. The hearing was held April 13, 1971, and a recommended decision was issued on June 4, 1971, to which Borden filed exceptions on June 17, 1971. A month and a half later, on July 31, 1971, Borden closed its Des Moines plant. Six days later, on August 6, 1971, the Secretary issued a final decision which was the same in all material respects as his recommended decision (which predated by almost 2 months the closing of Borden's plant). The Secretary's final decision increased by 3¢ the Quad Cities-Dubuq[illegible] Class I price, and decreased by 5¢ the Des Moines Class I price (which lessened the differen[illegible] between the two orders by 8¢). (33 Agric. Dec. at 1014-16). That action was taken on [illegible] basis of new evidence presented at the new hearing. Although it was regarded as signif[illegible] by the court of appeals (544 F.2d at 318-19), it was actually irrelevant since each action b[illegible] Secretary must be judged by the facts before the Secretary at the time he takes the ac[illegible] not by facts developed at a later hearing.

Recognition in the order, through the medium of a loc differential, should be given to this difference in value.

So as to be equitable to all handlers, the minimum Class I to be paid for producer milk should not be dependent upon the of plant receiving the milk. However, to the extent that mil received elsewhere from producers and brought to the marketing by a handler, the handler has assumed a transportation cost w might otherwise be borne by producers. Accordingly, the Class I should be adjusted downward in the case of a plant which assume cost of hauling milk to the marketing area.

. . . .

It is customary in both regulated and unregulated markets handlers to pay producers delivering milk to country receiving stat a lesser price per hundredweight than is paid producers delive directly to bottling plants. To the extent that this represents a l price because of the location of the milk, such difference in v should be recognized under the order. It is concluded, therefore, the Class I price should be reduced by 10 cents for the first 65 n and by 1.5 cents for each additional 10 miles or fraction thereof respect to producer milk received at a plant which is not less tha miles from a central place in the primary center of consumption ir marketing area. Rock Island, Illinois, is such a place in the C Cities marketing area.

The location differential herein recommended is economi sound and will be equitable to all handlers wherever located. proposed rates are representative of the cost of hauling milk b efficient means to the market.

Prices paid producers supplying plants to which loc differentials apply should be reduced to reflect the lower value of milk f.o.b. the point to which delivered.

When the Quad Cities order was merged with the Dubuque (become the Quad Cities-Dubuque order, the Secretary continued adjustment provisions in the merged order, under which handlers r milk at a distant location would receive a minus location adjust <u>compensate them for the cost of moving the milk to the Quad Cities-D marketing area</u>. The Secretary stated in his final decision (25 Fe 11,100, 11,102 (1960)):

(e) <u>Location differential adjustments</u>. A schedule of loca differentials should be provided in the merged order to provid appropriate price adjustment at the location of any plant from w milk is moved to the marketing area.

As discussed earlier in this decision, the Class I price under the merged order should be reduced for milk received at pool plants in Jackson and Dubuque Counties, Iowa, and East Dubuque, Illinois. It is reasonable to assume that milk may move in the future into the marketing area from plants outside the marketing area, particularly from plants in the area farther north since there are large supplies of milk in that area.

So as to be equitable to all handlers, a schedule of location differential adjustments should be provided to reflect the cost of transporting milk to the marketing area for Class I use from such distant plants. The 10-cent price differential below the Quad Cities price which has prevailed in Dubuque is an appropriate differential for plants in that area. The same differential should apply to plants in the area adjacent to Dubuque but outside the marketing area. Since Dubuque is about 75 miles from Rock Island, a 10-cent differential should apply therefore at plants located outside the marketing area and 70 to 80 miles from Rock Island. For each additional 10 miles the differential should be increased by 1.5 cents, as provided in the present Dubuque and Quad Cities orders.

Prices paid producers supplying plants to which location differentials apply should be reduced also to reflect the lower value of such milk f.o.b. the point to which delivered.

When Borden's plant located in Des Moines became regulated under the Quad Cities-Dubuque order, even though Borden transported less than one-third of the milk from its Des Moines plant to the Quad Cities-Dubuque marketing area, it is undisputable that the economic justification for the minus 19¢ location adjustment did not apply to over two-thirds of the milk received at Borden's Des Moines plant. When the minus 19¢ location adjustment is combined with the 15¢ lower Class I price under the Quad Cities-Dubuque order, Borden had a 34¢ advantage over other Des Moines handlers with respect to Borden's distribution of over two-thirds of its milk in the Des Moines marketing area (Order No. 79), and in the marketing areas of Cedar Rapids (Order No. 70), North Central Iowa (Order No.78), Greater Kansas City (Order No. 64), Nebraska- Western Iowa (Order No. 65), and the nonregulated areas served by Borden's Des Moines plant.

From an agricultural economist's viewpoint, the economic justification for the minus 19¢ location adjustment did not even apply to the less than one-third of Borden's milk "back-hauled" in packaged form to the Quad Cities-Dubuque area. Borden's Des Moines plant was not in the nature of a distant, country supply plant vis-a-vis the Quad Cities-Dubuque market, at which milk would have had a lesser location value than milk delivered closer to the Quad Cities-Dubuque consumption center. There is no reason why producers should receive less for their milk delivered to Des Moines because Borden voluntarily decided to close its Rock Island plant and engage in an uneconomic backhaul, contrary to the prevailing movement of milk in the

area. See *Sunny Hill* (§ VII(D), *supra*), in which Sunny Hill's uneconomic backhaul of 69% of its milk from the Cape Girardeau area to St. Louis was no basis for not making Sunny Hill pay the true location value of its milk. In *Borden*, from an economic viewpoint, the location value of Borden's milk at its Des Moines plant, which, prior to September 1970, was M-W plus $1.45, did not change merely because Borden chose to close its more advantageously located plant (from the standpoint of serving the Quad Cities-Dubuque area) at Rock Island.

Faced with this situation, the Secretary removed the minus 19¢ location adjustment, and then imposed a plus 15¢ location adjustment, to put Borden's Des Moines plant in the same position as it was before it became regulated by the Quad Cities-Dubuque order.

Turning now to the court of appeals decision, in setting aside the Secretary's actions designed to make Borden continue to pay the Des Moines order Class I price for milk at its Des Moines plant (without any minus location adjustment), even after it became subject to regulation under the Quad Cities-Dubuque order, the court of appeals states that it is following the principles stated in *Zuber* (§ VII(A), *supra*) and *Fairmont* (§ VII(C), *supra*) that a location adjustment is to compensate producers for rendering an economic service of benefit to the handler, *viz.* (544 F.2d at 316):

> The Secretary is authorized to make only certain adjustments and these are to "compensate or reward the producer for providing an economic service of benefit to the handler." *Zuber*, supra, 396 U.S. at 184, 90 S.Ct. at 323. And "the permissible adjustments are limited to compensation for rendering an economic service." *Zuber, supra*, at 188, 90 S.Ct. at 325. *Fairmont, supra*, at 767. "The court must invalidate orders resting on any basis other than such economic reasons,--whether the orders are ascribable to whim, which seems unlikely; or to the response of major farm interests, which may be more likely; or merely bureaucratic error in supposing that the wisdom of experts as to what is needed in the public interest must be given dominance over the constraint of Congress." *Fairmont, supra*, at 766.

The court then examined what it believed to be the two economic justifications advanced by the Secretary in support of his actions, and found both to be without evidentiary support in the record. The Secretary's first supposed economic justification was that the price increase was "for Borden's own good," because otherwise Borden might not receive an adequate supply of milk. The court states (544 F.2d at 316):

> The first economic justification was a "for Borden's own good" finding: "[I]t is not reasonable to expect producers to continue to deliver milk to the Borden, Inc., plant while higher prices are available to them at most other regulated plants in the region, including those located in the Quad Cities-Dubuque marketing area" (October 1, 1970 order).

The court notes that Des Moines is a "deficit market" which imported approximately 10% of its milk from outside the area during the 13 months

preceding the October 1, 1970, challenged action (544 F.2d at 316).[52] However, the court quotes testimony from a Borden witness that it was assured an adequate supply of milk from Mississippi Valley, and the court finds no evidentiary basis for what the court believed to be the Secretary's first purported economic justification, stating (544 F.2d at 316-17) (footnotes omitted):

> There is no evidence in the record that Borden would suffer in short supply. The only evidence of short supply generally was the testimony of the Mid-America representative:
>
> > [T]here is some doubt as to the availability of a milk supply for a Quad Cities-Dubuque pool plant located in the City of Des Moines if present pricing provisions of the Quad Cities-Dubuque order prevail.
>
> Ex. E. at 24 (emphasis added [by the court]). 2/
>
> In the first place this testimony ("some doubt") is purely speculative. 3/ In the second place, if it is to be given any weight whatever, being couched in general terms it would not support the Secretary's equally speculative finding ("not reasonable to expect" adequate supply) of a short supply for Borden.
>
> . . . .
>
> . . . We have searched the record in vain to find evidence supporting the first purported economic justification for the three orders--that is, inadequate supply of milk for Borden--and find none.

In the first place, as explained above, the "for Borden's own good"[53] finding found by the court to be unsupported by evidence was made on a temporary, emergency basis, without a hearing and, therefore, it could not have been based on any evidence. After the Secretary held a hearing, the Secretary stated three major justifications for his action, none of which relate to the availability of milk at Borden's plant. Although the Secretary made a minor reference to the fact that unless alternative marketing outlets available to

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[52]In the present case, the handlers in Zone 8 import almost 90% of their milk from outside of Zone 8 (§ III(B), *supra*).

[53]Milk orders are established for the benefit of "producers and consumers"--not handlers (7 U.S.C. § 602(4); *In re Moser Farms Dairy, Inc.*, 41 Agric. Dec. 7, 22-23 (1982); *In re Lamers Dairy, Inc.*, 36 Agric. Dec. 265, 288- 89 (1977), *aff'd*, No. 77-C-173 (E.D. Wis. Sept. 28, 1977), *printed in* 36 Agric. Dec. 1642 (1977), *aff'd*, 607 F.2d 1007 (7th Cir. 1979) (unpublished), *cert. denied*, 444 U.S. 1077 (1980); *In re Michaels Dairies, Inc.*, 33 Agric. Dec. 1663, 1709 (1974), *aff'd*, No. 22-75 (D.D.C. Aug. 21, 1975), *printed in* 34 Agric. Dec. 1319 (1975), *aff'd mem.*, 546 F.2d 1043 (D.C. Cir. Dec. 17, 1976). And see § VI(B)(1)(a), *supra*.

producers are taken into consideration, milk "may not be availab
Borden's plant, this was certainly not the first, or even a major, eco
justification advanced by the Secretary in support of his challenged act

In the second place, the court in *Borden* was not setting forth eco
justifications that are *required* to support a location adjustment but, i
the court was merely dealing with the two economic justifications it sup
the Secretary had advanced. Accordingly, *Borden* does not hold that a f
of an inadequate supply of milk is necessary to support a location adjus

Furthermore, in the present case, the Secretary's location adjustme
clearly imposed to compensate producers for transporting milk to a
zone (Zone 8), which had to import approximately 90% of its mill
contrast, in *Borden*, only 10% of the Des Moines milk supply was im
from other areas during the 13 months preceding the Secretary's chal
action.) The Secretary's findings here as to the need to increase the lc
adjustment for Zone 8 to attract milk to that deficit area are econor
sound irrespective of whether there was any shortage or potential short
milk in the Zone 8 area, and the Secretary's findings and conclusions
threat to the continued availability of milk supplies for Zone 8 plants m
interpreted to relate to the situation *under the pricing provisions of th*
(see § VI(B)(4)). As so interpreted, the findings and conclusions are r
and economically sound irrespective of any potential shortage in the
supply of milk for Zone 8 (§ VI(B)(4)). Accordingly, the first issue
Borden holding is not relevant here.

Turning now to what the court perceived to be the Secretary's
justification supporting his actions (i.e., disruptive competitive relatic
among handlers), the court found no evidentiary support for the Secr
finding. The court states (544 F.2d at 317-19):

> The second finding intended to justify the October 1 order a
> presumably also the other two orders provided:
>
> > Such price disparity as between a Quad Cities order plant and a Des Moines order plant located in the Des Moines marketing area would disrupt competitive relationships among such handlers distributing milk in that market. Moreover, it would also threaten orderly marketing in several neighboring markets, such as Kansas City, where milk is distributed from the Borden, Inc., plant at Des Moines.
>
> . . . .
>
> In addition to the evidence adduced at the October 8, 1970 a
> April 13, 1971 hearings, we have examined the ALJ's Initial Decisi
> the Judicial Officer's "Additional Conclusions" and the Secretary's b
> on appeal, as well as the three orders themselves in an attempt to f
> any basis upon which to support the second purported econo
> justification. We can find none. In fact, it is somewhat extraordin
> that with a record of the volume of that before us the Secretary
> point to no supportive evidence other than the expressed desires

Mid-America and several milk handlers competing with Borden that Borden be stripped of the 34 cents minus price difference.

The court's reasoning as to this issue reveals such a lack of understanding of (i) the facts of the *Borden* case, (ii) the milk marketing regulatory program, and (iii) the proper concerns of the Secretary in establishing location adjustments, that a detailed analysis of the court's reasoning is necessary.

At the outset, it should be noted that here, as in the case of the first supposed economic justification advanced by the Secretary, the court erroneously quoted the Secretary's finding from the emergency, temporary action for the month of October, that was made without a hearing. But the court's error, in this respect, is not serious (unlike the court's identical error with respect to the first supposed economic justification), because in the Secretary's later, final decision issued after a hearing, the Secretary relied on the same circumstance.

The court begins its analysis of the competitive-relationship issue with the erroneous thought that in *Borden*, as in *Fairmont* (§ VII(C), *supra*), the Secretary could have dealt with the problem by amending the Des Moines order, rather than the Quad Cities-Dubuque order. In *Fairmont*, the court engaged in a "very careful scrutiny of the evidence" because the Secretary had available a less burdensome alternative (a compensatory payment could have been applied to the Eastern Colorado order rather than an increased location adjustment in the Nebraska-Western Iowa order) (*Fairmont*, 442 F.2d at 771). The court in *Borden* states (544 F.2d at 318):

> The Secretary then purported to remedy the alleged market disruptions by dealing with the Quad Cities-Dubuque marketing order instead of with the Des Moines order. In a similar situation, the District of Columbia Circuit said [*Fairmont*, 442 F.2d at 772]:
>
>> Assuming that the Nebraska-Western Iowa Order is a proper vehicle for remedying market disruptions in the Eastern Colorado market, there must be substantial evidence of such disruption in order to justify the imposition of such price differentials for this purpose. Mere speculation is no warrant for deviating from a principle as paramount as that of uniform price structure within a single order, particularly where the Secretary has other techniques available.

However, the problem in *Borden* could not have been cured by an amendment to the Des Moines order. The problem arose when Borden's Des Moines plant, which had been paying M-W plus $1.45 for its Class I milk (when it was regulated under the Des Moines order), suddenly began paying 34¢ less in the month of October, because of a lower Class I price and location adjustment provisions in the Quad Cities-Dubuque order. As shown above, less than one- third of Borden's Des Moines plant milk was transported by Borden to the Quad Cities-Dubuque area, and, therefore, there could be no economic justification for that 34¢ "windfall" to Borden as

to over two-thirds of its milk (leaving aside the issue discussed above as lack of justification for the "windfall" even as to the milk back-hauled Quad Cities-Dubuque marketing area).

Unlike *Fairmont*, a compensatory payment provision in the Des M order would not solve this situation. Borden's Des Moines plant w longer regulated by the Des Moines order. The only thing the Secretary have done to the Des Moines order to eliminate the 34¢ comp advantage Borden had over all other Des Moines plants regulated und Des Moines order would have been for the Secretary to reduce the C price in Des Moines by 34¢. That would have been an absurd solution, would have deprived all producers delivering milk to all handlers i Moines of the true economic value of their milk.

In this respect, as stated above (note 51), when the Secretary l hearing to consider the intermarket price relationship between a num orders, including the Des Moines and Quad Cities-Dubuque order Secretary increased the Quad Cities-Dubuque Class I price by 3¢ decreased the Des Moines Class I price by 5¢, effecting a total decre the price disparity between the two Class I prices of only 8¢. Accordi that hearing had been held in time to be considered by the Secretary wl took the actions involved in *Borden*, the Secretary could have solved o of the 34¢ problem by Class I price changes, leaving 26¢ of the problem taken care of by the action challenged in *Borden*. Hence the court's vie the *Fairmont* doctrine was applicable was erroneous.

The court then concluded that no economic disruption or advantage occur with respect to Borden's sales in the Des Moines market b Borden had voluntarily agreed to pay producers an additional 15¢ per all milk purchased by Borden for resale in Des Moines. The court state F.2d at 318):

> Also, there was nothing unusual or improper in the fact t Borden "agreed with its producers to pay an additional amount of cents per hundredweight on all milk purchased for resale in the I Moines Market Area." ALJ Initial Decision, adopted by the Judi Officer, Ex. 35 at 18. . . .
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> . . . .
>
> We now consider the evidence, if any, supporting the seco economic justification. In regard to raw milk purchased for resale Des Moines, Borden had already agreed to pay plus 15 cents hundredweight for such milk so that no economic disruption advantage could occur.

There are two serious problems with the court's view. First, the Se has the right and duty to establish pricing provisions that reflect pre economic conditions. The Secretary is not required to depend recognize, voluntary agreements for over-order premiums (§ § III(I VI(B)(4)). In fact, as shown above, the existence of over-order prem regarded by many experts as an indication that the Secretary's provisions are defective (§ VI(A), *supra*). Furthermore, Congress rec

in the Food Security Act of 1985 that over-order premiums have "caused instability that the federal milk order program was designed to alleviate," and Congress mandated changes to "reduce the need for over-order payments and provid[e] equity among handlers supplying the market" (§ IV, *supra*).

Second, the court forgot, or totally ignored, the additional 19¢ price advantage Borden had with respect to sales in the Des Moines marketing area resulting from the 19¢ location adjustment. Hence even if the 15¢ voluntary payment were considered, that still left Borden with a 19¢ competitive advantage over any other handler in Des Moines serving the Des Moines area.

The court then states that even if Borden theoretically had a competitive advantage, the advantage would be eliminated if it were exploited. The court states (544 F.2d at 318):

> Furthermore, if Borden even theoretically had a competitive advantage and thereby increased its Des Moines sales, the slightest increase in Des Moines sales would have resulted in Borden's selling the plurality of its Class I milk in Des Moines and automatically transferred Borden's plant to regulation under the Des Moines order, thus eliminating the advantage.

The problem with that argument is that it completely misunderstands the competitive problems that are of proper concern to the Secretary. The court assumes, erroneously, that the only concern resulting from one handler having a price advantage over another handler is if the handler exploits the price advantage by increasing its market share--i.e., by taking customers away from its competitors. But in our free enterprise system, profit is the name of the game! Without the Secretary's actions, Borden was guaranteed a 34¢ cost advantage over all other Des Moines handlers distributing milk in Des Moines. It would be unconscionable for the Secretary to establish minimum prices that handlers must pay for their raw product, that intentionally favor one handler by 34¢ per cwt over other handlers in the same area, irrespective of whether the favored handler used the price advantage to gain increased sales.[54] Hence the court completely misses the point with respect to the

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[54]As shown in many cases, *e.g.*, *Schepps Dairy* (§ VII(F), *infra*), the Secretary cannot, and is not required to, eliminate every cost disparity between handlers. As stated in *United States v. Mills*, 315 F.2d 828, 838 (4th Cir.), *cert. denied*, 375 U.S. 819 (1963):

> After all, the Secretary must look at the area with a wide and comprehensive perspective. He has before him the entire output of milk in the area, and he must search for the best ways and means for its disposition. Aware of the annual consumption and distribution of fluid milk, he must arrange to channel the residue into outlets the most advantageous to the producer and consumer. He fashions his order accordingly. Of course, there may be some resultant damage to a handler or producer in the enforcement of the Act but this lack of perfection does not destroy the validity of the Order. The constitutionality of the Act is no longer questionable. United States v. Rock Royal Co-op., supra, 307 U.S. 533, 568-581, 59 S.Ct. 993, 83 L.Ed. 1446. Absolute equality is not demanded to sustain the operation of the Order. If the Secretary cannot "produce complete equality, for the variables are too numerous", he "fulfills his role when he makes a reasoned" Order. Mitchell v. Budd,

proper concerns of the Secretary involving the competitive relationship between handlers (see § VI(A), *supra*).

Furthermore, the court's premise is implicitly based on an illogical assumption. The court implicitly assumes that Borden would exploit its competitive advantage only in the Des Moines marketing area. But Borden could also have exploited its competitive advantage to "steal" customers from other Des Moines plants in the other regulated and nonregulated marketing areas served by Borden's Des Moines plant and by its competitors; and Borden could have used its profits from all those areas to subsidize price cuts in the Quad Cities-Dubuque marketing area, to subsidize increased sales in the Quad Cities-Dubuque area, so that it would continue to be regulated under that order. Hence the basis for the court's economic forecast was faulty.

The court then concluded that Borden enjoyed no competitive advantage over other handlers in the Quad Cities-Dubuque market, and that the Secretary's action created, rather than eliminated, disruptive competitive relationships. The court states (544 F.2d at 318):

> Nor did Borden enjoy any competitive advantage over other milk handlers in the Quad Cities-Dubuque market inasmuch as they were all subject to the same Quad Cities order with the same location adjustments. However, when the three orders at issue here were promulgated, Borden immediately suffered a 19 cents per hundredweight economic disadvantage.[55] If anything, the orders created, rather than tending to eliminate, disruptive competitive relationships.

Here, again, the court is totally confused. It was never contended that Borden enjoyed a competitive advantage over other Quad Cities-Dubuque handlers. Borden's competitive advantage was over other handlers in Des Moines regulated by the Des Moines order.

As shown above, Borden had a 19¢ competitive advantage over other Des Moines handlers distributing milk in the Des Moines area even if Borden's voluntary 15¢ over-order premium is (erroneously) taken into consideration.

Moreover, Borden had a 34¢ per cwt competitive advantage over all other Des Moines handlers distributing milk in the other areas supplied by Borden's Des Moines plant, *viz.*, the marketing areas of Quad Cities-Dubuque (Order No. 63), Cedar Rapids (Order No. 70), North Central Iowa (Order No. 78)

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350 U.S. 473, 480, 76 S.Ct. 527, 531-532, 100 L.Ed. 565 (1956).

Nonetheless, it would be unconscionable for the Secretary to fail to address inequity among handlers in appropriate circumstances, such as the facts involved in *Borden* (see § VI(A) *supra*).

[55]As stated above in this subsection, Borden's 19¢ competitive disadvantage as to other Quad Cities-Dubuque handlers applied only to the fraction (less than one-third) of Borden's milk transported to the Quad Cities-Dubuque area. And even as to that fraction, Borden presumably was able to compete profitably with other Quad Cities-Dubuque handlers in some parts of the Quad Cities-Dubuque area, since even before Borden closed its Rock Island plant it served some parts of the Quad Cities-Dubuque area from its Des Moines plant.

Greater Kansas City (Order No. 64), Nebraska-Western Iowa (Order No. 65), and nonregulated areas. The court completely forgot, or ignored, Borden's 34¢ competitive advantage over every other Des Moines handler distributing milk in those marketing areas, in its concern for the tail of the dog, i.e., the less than one-third of Borden's milk back-hauled to the Quad Cities-Dubuque marketing area.

Finally, the court totally ignored two of the major reasons advanced by the Secretary for his challenged actions, (1) to prevent abrupt changes in minimum prices to producers if a slight shift in Borden's distribution pattern resulted in a change in the order under which Borden was regulated,[56] and (2) to recognize that the economic value of milk is affected not only by transportation costs, but, also, by alternative outlets available to the producers.[57]

In short, the court's reasoning reveals such a lack of understanding that the *Borden* decision will not be followed by the Judicial Officer in any case, even in the Seventh Circuit. But, in any event, its holding is not inconsistent with the Secretary's action or decision at issue here.

F. *Schepps Dairy, Inc.*

In 1975, when the Secretary merged six existing Texas milk orders into a single order, he rejected a proposal offered by Schepps Dairy, Inc., to increase the same location adjustment that is involved in the present proceeding. Schepps challenged the Secretary's refusal to increase the location adjustment, and the Secretary's refusal was affirmed. *In re Schepps Dairy, Inc.*, 35 Agric. Dec. 1477 (1976), *aff'd*, No. 76-1984 (D.D.C. Aug. 15, 1977), *aff'd sub nom. Schepps Dairy, Inc. v. Bergland*, 628 F.2d 11 (D.C. Cir. 1979). In sustaining the Secretary's refusal, I adopted as the final decision the initial decision by Chief Administrative Law Judge John A. Campbell, with a few minor changes, including the addition of footnotes 5a, 6a, 7a and 7b, and, therefore, the Chief Administrative Law Judge's decision became my decision, with the minor changes. 7 C.F.R. § § 1.142(c), .145(i).

Schepps Dairy processed all of its milk in the Dallas, Texas, area, but sold 60% of its milk in the Houston area. Schepps contended that "perpetuating a location adjustment based on 1.5¢ per cwt. for every 10 miles" is illegal because it (35 Agric. Dec. at 1479):

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[56] In other words, the Secretary was concerned with intermarket alignment of prices (see § VI(A), *supra*).

[57] It was not disputed that the "location value" of milk in Des Moines purchased from producers by a Des Moines-order regulated handler was M-W plus $1.45. The economic "location value" of the milk obviously did not change with respect to the great bulk of Borden's milk that was never transported by Borden to the Quad Cities-Dubuque area, and, although it is less obvious to one who is not a dairy marketing expert, the economic "location value" of the milk did not even change as to the less than one-third of Borden's milk back-hauled to the Quad Cities-Dubuque marketing area.

(a) does not reflect actual transportation costs, (b) is not suppor by substantial record evidence, (c) is violative of uniform price a trade barrier provisions of the Act, and (d) puts petitioner a competitive disadvantage with Houston handlers where it distribu approximately 60% of its milk.

The Secretary's 1975 final rule making decision, based on a 1 hearing record, is set forth in my decision in *Schepps Dairy*. The Secr 1975 rule making decision rejected Schepps proposal to increase the lo adjustment from 1.5¢ per cwt per 10 miles to 2.2¢ because (i) the p pattern of milk prices throughout the Texas area has attracted sufficie not excessive, raw milk supplies to handlers in Texas, (ii) only haulin associated with the movement of *bulk* milk are relevant, but th substantive cost data made available at the hearing relates to movem milk in *packaged* form,[58] and (iii) price uniformity for all handlers in a does not contemplate a "precise" alignment of prices (or raw milk costs different locations based on actual hauling costs, and, therefore, a h must assume any competitive risks if he chooses to sell milk in an area other handlers have lower costs. Specifically, the Secretary's 1975 rule m decision, based on the 1973- 74 hearing record, states (35 Agric. Dec. a 87) (footnote omitted) (emphasis added):

> The handler proposing a price structure based on a locat adjustment rate of 2.2 cents per 10 miles claimed in his exception the recommended decision that the adopted pricing, which larg reflects a 1.5-cent rate, fails to recognize an increase in the cost hauling milk. The handler contended that the uniformity of prices all handlers, as prescribed by the Act, cannot be achieved unless differences in Class I prices at various locations in the market refl the actual costs of transporting milk. He further stressed that a fail to reflect such costs in the Texas price structure would discrimin against him in that this would create an artificial barrier to effec competition for packaged milk sales in distant parts of the market. was his contention, for example, that the present 36-cent difference Class I prices at Dallas and Houston, which would be continued, d not cover the cost of moving packaged milk from his Dallas process plant to sales outlets in the Houston area. The handler claimed t the cost of raw milk to Houston handlers f.o.b. their plants is thus l than the cost of his milk after it has been processed at Dallas a moved to the Houston area.
>
> The Class I price structure under the Texas order is not intended assure each handler in the market that he will have cost compatibi

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[58]Petitioners contend that Schepps' *theory* in 1975 related to the costs of transpor milk, rather than packaged milk (Answer of Petitioners to Respondent's Appeal Petiti 24). But I sustained the Secretary's rule making action on the grounds set forth in final decision, *viz.*, that Schepps' *evidence* related only to packaged milk. It is too late petitioners, *in effect*, to collaterally attack the basis for the Secretary's 1975 rule making or my 1976 adjudicatory decision, which was affirmed on appeal.

at any location at which he may choose to distribute milk. Its purpose is to assure handlers, and ultimately consumers, of an adequate milk supply. There has been a reasonable demonstration that the present pattern of milk prices throughout the Texas area has attracted sufficient, but not excessive, raw milk supplies to handlers operating in the various parts of the State. Local considerations do suggest certain price changes at specific locations, and these have been dealt with in this decision. Nevertheless, the supply-demand balance in the market does not warrant a major restructuring of prices that necessarily would result if prices were to reflect a higher transportation rate. 6a/

There is little doubt from the record that there has been some increase recently in the cost of hauling milk. However, to the extent that hauling costs are an important consideration in establishing the level of prices, only those costs associated with the movement of bulk milk should be considered. The price structure is intended to attract raw milk supplies to a given location, not packaged milk. The only substantive cost data made available at the hearing were those relating to movements of milk in packaged form. These were offered by the handler proposing the 2.2-cent location adjustment rate. Although some of the increased costs would affect the movement of bulk milk as well, no extensive cost data were presented with regard to the actual current trucking costs for movements of milk in bulk form. The handler presenting the cost data for packaged milk movements also offered his analysis of how these costs would translate into the cost of hauling bulk milk. The analysis was based on a Department study that used 1969 cost data in developing synthetic costs of hauling bulk milk over long distances. The handler updated this study using various economic indices. Although a synthetic cost study may be useful as a guide, it must be recognized that the hauling costs presented in the study are constructed, or estimated, costs and not costs actually incurred by specific milk haulers. Changes in transportation allowances under an order should reflect widespread current operating experience in the wide market.

In spite of some increase in hauling costs, adequate raw milk supplies are in fact being made available to handlers throughout the Texas market. This includes substantial movements of milk from the northern part of Texas to the southern areas of the State. There is no indication that increased hauling costs are deterring such milk movements. It is reasonable, then, to have the Class I price structure for the Texas market continue to reflect a transportation rate of 1.5 cents per hundredweight for each 10 miles. Accordingly, pricing considerations for specific areas in the market, as discussed later, are dealt with within this framework.

Contrary to the exceptor's contentions, price uniformity for all handlers in a market does not contemplate a "precise" alignment of prices (or,

in effect, raw milk costs) at different locations based on actual hauling costs. In fact, this is something that simply cannot be achieved. The cost of transporting milk differs from hauler to hauler (as well as between bulk milk and packaged milk if recognition were to be given, as desired by exceptor, to packaged milk movements). Any reflection of hauling rates in an order could be no more than a reflection of the average hauling rate being experienced by all handlers in the market. This in itself precludes any precise price alignment for individual handlers. Also, it is not possible to establish a price structure under which each plant's Class I price is lower, and at the same transportation rate, than the price at every other plant in the market. Such an arrangement is administratively unworkable in that it would require multiple Class I prices at each plant location.

A handler may distribute milk in any area he chooses. Should he decide to sell milk in an area where handlers have a lower cost, he must assume any competitive risks involved. It would be uneconomic to have the order provide a handler with cost comparability at any location at which he may choose to distribute milk.

In sustaining the Secretary's 1975 rule making decision, I held that substantial evidence supported the Secretary's decision (35 Agric. Dec. at 1487-90, 1497-98). I further held that the Secretary is not limited only to considerations involving transportation costs, but that it is also permissible for the Secretary to consider other objectives of the Act, e.g., the price necessary to assure an adequate supply of milk in all areas, and the alignment of prices between orders (35 Agric. Dec. at 1490-93).

I sustained the Secretary's rule making views that price uniformity for all handlers does not require the Secretary to establish location adjustments guaranteeing handlers competitive raw milk costs with respect to any area in which they choose to distribute milk, stating (35 Agric. Dec. at 1493) (footnotes omitted):

> Petitioner has argued that it faces competitive inequities in the Houston market because of its costs for transporting packaged milk. It suggests that the price Houston handlers pay be higher, and more accurately reflect transportation costs, so that petitioner can compete more effectively in Houston. The short answer to petitioner's argument is that "the Act does not reach the retail sale of milk." *Dairylea Cooperative Inc. v. Butz, supra* [504 F.2d 80 (2d Cir. 1974)], at page 87.
>
> The Houston location adjustment is not intended to reflect competitive equity or price uniformity with handlers from the North who choose to distribute in this area. The fact that petitioner can be, and has been, a competitive factor in Houston is incidental to the application of a location adjustment at Houston on the price paid for producer milk. 7/

Location differential provisions cannot be established on the basis of the distribution patterns of handlers. Packaged milk distribution patterns are solely a business decision. Location differentials provide an economic incentive for the delivery of milk to a handler's plant. It would be of questionable legality for the Secretary to impose higher or lower location differentials because of handler distribution patterns. The Act does not permit adjustments on that basis, but solely on the basis of "the location at which delivery of such milk . . . is made [by the producer] to such handler." A differential based on place of distribution would not be an adjustment permitted by the Act. 7a/

Finally, and significantly, I recognized that it is for the Secretary in his rule making capacity to make policy judgments based upon conflicting testimony and conflicting considerations, and that even though other regulatory alternatives might have been more persuasively reasonable, that is not enough to set aside, as illegal, the regulatory alternative selected by the Secretary. Specifically, I stated (35 Agric. Dec. at 1493, 1495, 1497-98):

Section 8c(4) requires not only that order provisions be based upon record evidence, but that they also tend to effectuate the declared policy of the Act. Petitioner's argument ignores the discretionary power conferred upon the Secretary with respect to such finding. As noted earlier, there was extensive testimony at the hearing relating to various approaches and considerations to be taken in determining the appropriate location adjustment. The fact that the Secretary chose one regulatory alternative over another cannot logically give rise to cries of illegality. *Lewes Dairy, supra* [401 F.2d 308 (3d Cir. 1968), *cert. denied*, 394 U.S. 929 (1969)], at page 319.

. . . .

While the Secretary's finding as to the effectuation of the policy of the Act must be based on the evidence introduced at the hearing, there is no compulsion that the Secretary find that a proposal will tend to effectuate the statutory policy even though supported by evidence.

. . . .

In order to successfully challenge the decision of the Secretary, petitioner cannot merely show that, on the balance, its position is supported by evidence in the record, or vaguely allege that the Secretary's decision is unsupported in the record. Petitioner has the substantial burden to overcome a strong presumption of the existence of facts which support the administrative determination. *Lewes Dairy, Inc., supra*, pages 315-316. The Act gives the Secretary broad discretionary powers to effectuate its purposes. The existence of regulatory alternatives, even those which might be more persuasively

reasonable, is not cognizable on review, *Lewes, supra*, pages 317, 319

This proceeding does not afford petitioner a forum to review questions of policy, desirability, or effectiveness of Order provisions *In re Sunny Hill Farms Dairy Co.*, 26 A.D. 201, 217 [, *aff'd*, 446 F.2 1124 (8th Cir. 1971), *cert. denied*, 405 U.S. 917 (1972)]. It is no sufficient for petitioner to show that the record may contain evidenc supporting its positions. On the contrary, petitioner must establis clearly that the record cannot sustain the conclusion reached by th Secretary.

Within this narrow framework, it cannot be concluded that th Secretary's decision with regard to location adjustments is clearl illegal.

In affirming the judgment of the district court, which affirmed my dec in *Schepps*, the court of appeals states that the adjustments to price unifor among producers and handlers "are solely 'for the purpose of reflectin economic service of benefit to the handlers'" (628 F.2d at 18), qu *Fairmont Foods Co.* (§ VII(C), *supra*), which, in turn, was quoting *Zub Allen* (§ VII(A), *supra*).

In sustaining the Department's position that the Act does not requir Secretary to set location adjustments exactly reflecting transportation cost court held that the adjustments are permissive, not mandatory, stating F.2d at 18-19) (footnotes omitted):

> Adoption of Schepps reading of Section 8c(5)(A) would hav extremely far-reaching consequences. It would require constan monitoring and modification of all inter-market and intra-market clas I minimum prices in order to keep abreast of current transportatio costs. For instance, the base class I price in Dallas, which is the sun of the M-W price and a transportation factor calculated at 1.5 cent per cwt. per ten miles, would have had to be increased immediately t account for then-present transportation costs--if Schepps' estimate wa accurate--of 2.2 cents per cwt. per ten miles. 50/ Indeed, th Secretary's carefully crafted zone system, under which handlers' plant within the same general area are treated identically for purposes o administering the location adjustment, would have to be scrapped i favor of a rate scale attuned more finely to the location of eac individual plant, a system the infeasibility of which is hardly open t serious question. 51/
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> The language of Section 8c(5)(A) itself runs somewhat counter t Schepps' contentions. It is that uniform minimum prices are "subjec . . . to" certain adjustments, 52/ and that connotes a permissive, not mandatory, qualification. 53/ The text of the congressional committe reports is of the same tenor. 54/ More importantly, Section 8c(4 authorizes the Secretary to promulgate a marketing order only "if h finds . . . that the issuance of such order and all of the terms an conditions thereof will tend to effectuate the declared policy of [th

> Act] with respect to [the] commodity." 55/ The principal statutory policies with respect to milk are to guarantee producers parity prices, 56/ to protect the health and purses of consumers, 57/ to establish and safeguard orderly marketing conditions 58/ and to assure to each area of the country "a sufficient quantity of pure and wholesome milk." 59/ The Secretary found that the 1.5 cent location adjustment had brought forth an adequate but not excessive supply of milk throughout Texas. 60/ A larger location adjustment, such as that sought by Schepps, would likely raise the price of milk to consumers in Houston and other areas distant from milk-producing regions. 61/ It might, too, disturb the inter-market alignment of class I prices, and engender excessive milk shipments into south Texas. 62/
>
> Schepps mounts no attack on the sufficiency of the factual predicate for the Secretary's ultimate finding that the proposed increase in the location adjustment would not serve the policies of the Act. 63/ It argues instead that the Secretary lacked power to make such a judgment, and that location adjustments are mandatory and must reflect transportation costs in toto. We think the straightjacket that Schepps thus would place on the Secretary will not fit; the argument simply cannot withstand the force of the plain meaning of Section 8c(4). 64/

The court further held that the Secretary may authorize location adjustments only to the extent that they are required to accomplish the broad purposes of the Act, stating (628 F.2d at 19) (footnote omitted):

> We agree with the Eighth Circuit [in *Sunny Hill Farms* (§ VII(D), *supra*)] that the Secretary may authorize location differentials only to the extent that they are "required to accomplish the broad purposes of the Act," 65/ and here, in the Secretary's judgment, they could only be disserved were Schepps to prevail.

As explained in the discussion of *Sunny Hill Farms* (§ VII(D), *supra*), the court in *Sunny Hill Farms* was particularly referring to the "broad" purpose of the Act to reward or compensate producers for providing an economic service of benefit to handlers, rather than to *other* broad purposes of the Act. Presumably, therefore, the court in *Schepps*, in the sentence just quoted, was also referring to the same "broad" purpose to compensate producers for providing a service to handlers. This is demonstrated by the court's statement in *Schepps* (in the court's third paragraph preceding this latest quotation), in which the court states that location adjustments "are solely 'for the purpose of reflecting an economic service of benefit to the handler'" (628 F.2d at 18).

Judge Wilkey, dissenting, expresses the view that the Secretary is required to establish location adjustments based upon ascertainable transportation costs, stating (628 F.2d at 23):

I regret that I am unable to concur in my colleagues' views herein. In brief, my view is that although the Secretary has considerable discretion in setting the minimum price for the zone, the three adjustments which the statute calls for him to make as to the minimum price are each based on ascertainable factors. Thus the transportation cost adjustment is to be based on the ascertainable transportation cost, and demonstrable deviations from a measure of real cost are impossible.

From the foregoing, it is clear that nothing in *Schepps* is contrary to the position of the Secretary here. The Secretary's 1975 rule making decision was based on the 1973-74 hearing record, which is completely different from the 1983 hearing record at issue here. The evidence in the 1973-74 hearing record related to *packaged* milk, while location adjustments must be based upon transportation costs for *bulk* milk. My decision held that there was no basis for upsetting the Secretary's rule making decision not to increase the location adjustment even if other regulatory alternatives were more persuasively reasonable, and the court of appeals similarly held, with one judge dissenting, that the Secretary was not required to establish location adjustments fully reflecting transportation costs.

Where, as here, the Secretary exercises his rule making discretion in the opposite direction, and determines on the basis of a later hearing record that conditions now warrant an increase in the location adjustment, nothing in *Schepps* is adverse to the Secretary's 1985 decision.

G. *Walmsley v. Block.*

In *Walmsley v. Block*, 719 F.2d 1414, 1418-20 (8th Cir. 1983), the court upheld changes in location adjustments in the Nebraska-Western Iowa milk marketing order (the same order involved in *Fairmont Foods* (§ VII(C), *supra*), but with intervening amendments), which reduced the Class I price paid to producers by 7¢ and 9¢ per cwt at certain locations. The decision centers on the minus 7¢ location adjustment promulgated by the challenged amendatory action.

Prior to the amendatory action, the most populated area, which included Douglas and Lancaster Counties, was in Zone 1, which received no location adjustment. Counties east of this area (Zone 2) received a minus 10¢ location adjustment, and counties in Western Nebraska (Zone 3) received a plus 15¢ location adjustment (719 F.2d at 1416).

Under the challenged amendments, Zone 2 was eliminated, and adjustments in the affected counties were based on their proximity to Omaha or Norfolk, Nebraska (719 F.2d at 1416). The producers challenging the Secretary's action delivered their milk primarily to supply plants located at Hartington and Orchard, Nebraska, which, prior to the amendatory action, had no location adjustments, but a minus 7¢ location adjustment applied at Hartington under the amendatory action (*id.*).

In sustaining the Secretary's amendatory action, the court relied on its prior holding in *Sunny Hill* (§ VII(D), *supra*), that location adjustments may be promulgated to encourage milk to move where it is needed and to align prices among neighboring markets. The court states (719 F.2d at 1418):

> We do not accept appellants' basic premise that the location adjustment may only reflect actual difference in transportation costs of delivery to the handler of the producer's choice. This court has held that the location adjustment serves to encourage milk to move from outlying market locations and to align prices among neighboring markets. In *Sunny Hill Farms Dairy Co. v. Hardin*, 446 F.2d 1124, 1126 (8th Cir. 1971), *cert. denied*, 405 U.S. 917, 92 S.Ct. 940, 30 L.Ed.2d 786 (1972), we upheld the Secretary's imposition of a +15¢ location adjustment for handlers in the Cape Girardeau area "to assure an adequate supply for plants in the area and also provide for better alignment of prices between orders." 29 Fed. Reg. 15130, 15139 (1964).

The court explained that the Secretary's decision is consistent with *Sunny Hill*. Specifically, the court quotes the following language of the Secretary's decision, in this respect (719 F.2d at 1419):

> The location pricing provisions under the order (zone prices and location adjustments at distant plants) assist in encouraging the movement of milk from supply areas to the principal population centers where it is processed for fluid use. Such provisions reflect the lesser value of milk when received at an outlying plant location or when diverted to an outlying location. Additionally, the location pricing provisions assist in maintaining a proper price alignment with nearby markets, which is essential to the attraction of raw milk supplies to various locations where needed.

The court repeated its statement in *Sunny Hill* that the Secretary has the burden of establishing that a location adjustment "is required to accomplish the broad purposes of the Act" (719 F.2d at 1419). The court states (*id.*) (first sentence quoting *Sunny Hill*; second sentence by court in *Walmsley*):

> He [the Secretary] always has the additional burden of establishing that the differential is, in fact, based upon the handler's location and that it is required to accomplish the broad purposes of the Act.
>
> Plainly, there must be a substantial showing of relation between the price differential and economic benefit. *Fairmont Foods Co. v. Hardin*, 442 F.2d at 767 n. 23.

As explained in the discussion of *Sunny Hill* (§ VII(D), *supra*), that statement in *Sunny Hill* does not mean that the Secretary must show that a location adjustment accomplishes one of the broad purposes of the Act <u>other than the broad purpose of the Act to price milk according to its location value</u>. This is again made clear in *Walmsley* in the sentence immediately following the quotation from *Sunny Hill* as to accomplishing the broad

purposes of the Act, *viz.*, "there must be a substantial showing of relation between the price differential and economic benefit." Where, as in the present case, a location adjustment compensates producers for hauling milk a great distance to a deficit zone, there is a "substantial showing of relation between the price differential and economic benefit."

In concluding that substantial evidence supported the Secretary's order challenged in Walmsley, the court approved of the Secretary's reliance on the broad trend for Class I prices to increase with distance from the surplus milk producing region of Minnesota and Wisconsin. The court states (719 F.2d at 1419):

> We find substantial evidence to support the Secretary's order. First of all, the Secretary's decision was based in part on broad market trends; the Secretary cited the fact that Class I prices "generally increase with distance from the surplus milk producing region of Minnesota and Wisconsin" to "reflect the theory that the Class I price . . . should not exceed the cost of importing milk from alternative sources of production." 46 Fed. Reg. at 8549. As the court noted in *Fairmont Foods Co. v. Hardin*, 442 F.2d at 767- 68, "[t]he Secretary may take account of large trends and flows when formulating regulatory policies."

The evidence which the court held sufficient to support the Secretary's findings as to transportation costs based on the handlers' location, and the need to encourage, *under the pricing structure of the order*, the movement of milk to the primary market, is similar to the undisputed evidence involved in the present case. The court states (719 F.2d at 1419-20):

> (a) Handler location. The Secretary cited multiple examples to support his conclusion that under the unamended order there was inadequate or no price adjustment to cover the cost of transporting milk from supply plants in Northern Nebraska to the consumption center in Southern Nebraska. These examples included supply plants at Orchard, O'Neill and Hartington, Nebraska, and Sibley, Iowa. The Secretary stated
>
>> There is presently no price adjustment to cover the cost of transporting milk from these supply plants to distributing plants to the south. Consequently, these costs must either be absorbed by the supply plant operator or, more likely, passed on to the distributing plant operator buying the milk.
>
> 46 Fed. Reg. at 8550.
>
> (b) Movement of milk to primary market. With respect to the need to encourage movement of milk to the primary market, the evidence reflected that the largest population center in the marketing area is Omaha-Council Bluffs; there are, in addition, two smaller urban areas, Lincoln and Sioux City. There are four major distributing plants in the Omaha-Lincoln area. Several witnesses testified that under the

> unamended order there was inadequate incentive to move milk to the Omaha-Lincoln area because of the flat pricing zone. For instance, milk shipped to Lake Preston, South Dakota, about 260 miles from Omaha, received a price only 12¢ below the price in Omaha. Milk diverted to non-pool plants in Benton and Clarkfield, Minnesota, at distances of 230 miles and 270 miles respectively from Omaha, were priced only 16¢ and 37¢ respectively below the Omaha price. Evidence also was introduced to show that the marketing area had become heavily dependent on milk shipped from Southwest Minnesota (15% of the producer milk or the market), Western Iowa (19%) and Eastern South Dakota (13%).

Note that the court speaks in terms of evidence relating to transportation osts and price incentives under the order, without any reference or concern s to whether there was any evidence as to an actual shortage of milk at the opulation center.

As to the evidence concerning price alignment, the court relied on the vidence showing that under the amendatory action, the prices in the Jebraska-Western Iowa milk marketing order were better aligned with prices 1 neighboring orders, *viz.*, Order 76 (Eastern South Dakota), Order 68 Upper Midwest) and Order 79 (Iowa). In addition, the court relied on vidence relating to the competitive disadvantage suffered by a plant operator /ho had to transport milk from an outlying area to the market center. (This ; the type of situation referred to in the legislative history of the Act, in which ilk delivered to a handler at a distance from the population center has a esser location value because of the additional transportation costs that will ubsequently have to be borne by the handler in shipping packaged milk to the opulation center (§ III(D), *supra*); it has nothing to do with the alleged ompetitive disadvantage suffered by petitioners in the present case, who are t a competitive cost disadvantage as to handlers more favorably located with espect to the production areas.)

In short, *Walmsley* is squarely supportive of the Secretary's action at issue ere.

VIII. <u>The Notice of Proposed Rule Making Adequately Advised Petitioners as to the Proposed Changes in Location Adjustments</u>

The ALJ properly rejected petitioners' argument that the notice of roposed rule making was inadequate, stating (Initial Decision at 39):

> Petitioners have further complained that the rule adopted substantially differed from those proposed, and therefore the action by the Assistant Secretary was not adequately noticed.
>
> However, as was held in *Walmsley v. Block*, 719 F.2d 1414, 1417-18 (8th Cir. 1983), a notice of hearing on proposals relating to changes in price zones and location adjustments adequately apprises interested parties of the nature of the changes to be considered, even though the

location adjustments ultimately ordered may differ from the proposals

> "Notice of proposed rule making under 5 U.S.C. § 553(b) must be sufficient to fairly apprise interested parties of the issue involved . . ., but it need not specify every precise proposal which [the agency] may ultimately adopt as a rule."

Accordingly, although the 1983 decision suffers from a number o fatal infirmities, inadequacy of notice is not one of them.

Conclusion

The Secretary's challenged action here is an example of administr practice at its finest. The Secretary considered all of the rele circumstances and made *a* rational decision (if not the *only* rational deci that could have been made) on the basis of the evidence before him. Th a perfect example of the proper use of a location adjustment to compen producers *under the pricing provisions of the milk order* for providing economic service, of benefit to handlers in Zone 8, of transporting milk a distance to that extremely deficit zone.

All arguments made by the parties and intervenors have been considered. To the extent that any arguments are inconsistent with the v set forth herein, and not specifically mentioned, they are rejected.

At the end of the Tentative Decision and Order filed July 22, 19 stated:

> Note: This is a Tentative Decision and Order. All parties and intervenors who have previously filed briefs will be permitted to fil a brief with respect to this tentative decision within 30 days afte service. The time will be extended upon motion of petitioners o respondent, and any extension granted will apply to all parties and intervenors.
>
> The purpose of filing a tentative decision is to afford the partie an opportunity to correct any mistakes appearing in this tentative decision, or to point out any additional arguments or circumstances that should be specifically addressed herein.
>
> For example, I state in a number of instances that petitioners do not challenge certain subsidiary facts found by the Secretary. I petitioners disagree, they should cite the specific line and page numbe of the brief where they challenge the *subsidiary* findings claimed in this decision to be unchallenged. I am well aware of the fact that petitioners contend that the evidence supporting the subsidiary facts does not support the Secretary's inferences or ultimate conclusions and that petitioners used the term "without evidentiary support," or its equivalent, many times (frequently as to "findings" which the Secretary never made) (e.g., Answer of Petitioners to Respondent's Appea Petition at 18, 19, 20, 21, 26, 31, 34, 36, 37, 43, 45, 47, 48, 66, 72). Nonetheless, as I read Petitioners' briefs, they do not challenge the specific *subsidiary* findings I refer to herein as unchallenged

(Accordingly, I have not read any of the hearing record from the rule making proceeding. If petitioners demonstrate that they have challenged the vital subsidiary findings I refer to herein as unchallenged, I shall, of course, read the entire record, or the relevant portions thereof cited by the parties.)

As another example, in § VI(B)(4), I express the view that the Secretary's findings as to the threat to Zone 8's milk supply should be interpreted in the light of the Secretary's knowledge that Zone 8 handlers could (and would) pay over-order premiums, in certain circumstances, to obtain an adequate milk supply. If my view as to the Secretary's meaning is not correct, respondent should correct any errors.

No useful purpose would be served by rearguing issues that have been previously argued and decided against the position previously expressed in briefs, unless a showing can be made that I have misunderstood or ignored some significant matter.

Petitioners do not need to restate any arguments previously made merely to preserve their position, in the event of an appeal. Unless petitioners expressly abandon a point previously made, all of their arguments previously made are hereby deemed to remain in effect as if they had been fully set forth in a response to this Tentative Decision and Order.

Respondent's 1½-page brief expresses complete agreement with the Tentative Decision and Order, except for noting one error as to a percentage figure, which was correctly stated on one page, but incorrectly stated on another.

Petitioners, in their 3¼ pages of Exceptions to the Tentative Decision and Order, disagree totally with the Tentative Decision and Order, but fail to cite any page of any of their briefs where they challenged the subsidiary findings claimed in the Tentative Decision to be unchallenged. Petitioners state (Exceptions, at 4):

10. The imposition of a burden on Petitioners to challenge "subsidiary findings" made by the Judicial Officer, or described by the Judicial Officer as having been made by the Secretary and as being unchallenged by Petitioners, is improper. The Tentative Decision and Order is in error in categorizing certain "findings" as "subsidiary" and others as something other than "subsidiary". Petitioners have specifically cited the errors made by the Secretary and the evidence which supports their position in their Brief, and are under no obligation to rewrite their Brief to challenge a construction of facts and "findings" which are unsupported by the record; indeed, Petitioners cannot cite to the Record or note in their Brief "evidence" when none exists in the Record. The Judicial Officer may therefore not presume

that Petitioners agree whenever the Tentative Decision and Order refers to any "findings" as being "unchallenged".

Here, again, petitioners miss the point (or, more likely, or unable respond to the point). Petitioners cannot, of course, "cite to the Record note in their Brief 'evidence' when none exists in the Record." But wh the Tentative Decision states repeatedly that certain subsidiary findings not challenged by petitioners--e.g., (i) that Zone 8 has the largest populati center in Texas (Houston/Beaumont), which is growing fast, (ii) that Zo 8 is an extremely deficit milk production area (importing about 87% of milk), (iii) that Zone 8 had to reach out the farthest for milk (over half Zone 8's milk had to be transported over 251 miles), and (iv) that 3¢ per per 10 miles does not exceed the actual hauling costs--if petitioners had, fact, challenged the evidentiary support for those findings, petitioners co have cited the page and line number of their brief challenging those findin They did not, and they could not! (To enable the reviewing courts to ve that fact, all of petitioners' briefs filed in this administrative proceeding sho be included in the record on appeal.)

Where, as here (i) petitioners' briefs make it clear that petitione argument that the Secretary's findings are not supported by substan evidence is based on an erroneous interpretation of the Secretary's findin and erroneous legal views as to what evidence is necessary to support findings actually made by the Secretary, (ii) petitioners' errors are detail in a lengthy Tentative Decision, which sets forth the correct interpretation the Secretary's findings, and specifies the subsidiary findings necessary support the Secretary's ultimate findings, with a statement (as to ea essential subsidiary finding) that it is not challenged by petitioners, and (petitioners were afforded the opportunity to show where they challenged subsidiary findings designated as "unchallenged" by the Judicial Officer, failed to do so, the Judicial Officer is under no obligation to read voluminous hearing record involved in the rule making proceeding.

For the foregoing reasons, the relief requested by petitioners should denied.[59]

Order

The relief requested by petitioners is denied and the petition is dismiss

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[59]This is one of a group of cases that has been unreasonably delayed in the Office of Judicial Officer. During 1985 and 1986, the workload of the Judicial Officer doubled. Beca of budgetary constraints, an assistant was not obtained until November 2, 1986.

In re: REPUBLIC AIRLINES, INC.
AWA Docket No. 316.
Order filed September 14, 1987.

Bradley Flynn, for Complainant.
Gloria Olson, for Respondent.
Order issued by Edwin S. Bernstein, Administrative Law Judge.

ORDER DISMISSING COMPLAINT

Counsel for complainant, in a Motion to Dismiss Complaint, advised that the respondent corporation has been acquired by Northwest Airlines, and that comlainant does not believe further prosecution is necessary. Complainant move to dismiss the complaint for good cause shown.

IT IS ORDERED, that the complaint in this case be, and hereby is, dismissed.

DISCIPLINARY DECISIONS

In re: BLACKFOOT LIVESTOCK COMMISSION CO.
P&S Docket No. 6107.
Order filed September 29, 1987.

Peter V. Train, Complainant.
Robert M. Cook, for Respondent.
Order issued by Victor W. Palmer for Judicial Officer.

ORDER LIFTING STAY

Judicial review having been completed, my order of April 4, 1986, staying imposition of the suspension provision of my order dated March 7, 1986, is hereby lifted. The suspension shall commence six days after service of the order on respondent.

Copies of this order shall be served upon the parties.

In re: JIMMY D. BRUNING.
P&S Docket No. 6769.
Order filed September 1, 1987.

Marlene W. Lassiter, for Complainant.
Respondent, pro se.
Order issued by Victor W. Palmer, Administrative Law Judge.

SUPPLEMENTAL ORDER

On December 5, 1986, an order was issued in the above-captioned matter, which, *inter alia*, suspended respondent as a registrant under the Act for a period of sixty (60) days and thereafter until such time as he is full compliance with the bonding requirements under the Act and the regulations and demonstrates that he is not longer insolvent.

Respondent is now in full compliance with the bonding requirements of the Act and is solvent. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued December 15, 1986, is terminated. The order shall remain in full force and effect in all other respects.

In re: EASTERN IDAHO LIVESTOCK MARKETING ASSOCIATION, INC. and BLACKFOOT LIVESTOCK COMMISSION COMPANY, DENNIS M. LAKE AND DELWYN ELLIS.
P&S Docket No. 6875.
Order filed September 29, 1987.

Peter V. Train, for Complainant.
Robert M Cook, for Respondent.
Order issued by Victor W. Palmer, Administrative Law Judge.

ORDER DISMISSING COMPLAINT AND ORDER TO SHOW CAUSE

For good cause shown and at complainant's request, the Complaint and Order to Show Cause is hereby dismissed.

In re: OZZIE GILLUM.
P&S Docket No. 6863.
Decision and order filed July 27, 1987.

Ben E. Bruner, for Complainant.
Respondent, pro se.
Decision issued by Victor W. Palmer, Administrative Law Judge.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF DEFAULT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondent wilfully violated the Act and the regulations promulgated thereunder (9 C.F.R. § 201.1 *et seq.*).

Copies of the complaint and Rules of Practice (7 C.F.R. § 1.130 *et seq* governing proceedings under the Act were served on the respondent b certified mail. Respondent was informed in a letter of service that an answe should be filed pursuant to the Rules of Practice and that failure to answe would constitute an admission of all the material allegations contained in th complaint.

Respondent has failed to file an answer within the time prescribed in th Rules of Practice, and the material facts alleged in the complaint, which ar admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. (a) Ozzie Gillum, hereinafter referred to as the respondent, is individual whose business mailing address is 860 South Stearns, Oakda California 95261.

(b) The respondent is, and at all times material herein was:

(1) Engaged in the business of buying livestock in commerce commission basis; and

(2) A market agency as that term is defined in the Act and sub
to the provisions of the Act.

2. Respondent was notified by certified mail that he was require
register with the Secretary of Agriculture and furnish an adequate bond o
equivalent to secure the performance of his livestock obligations under
Act. Respondent was further notified that if he continued his livest
operations under the Act without registering with the Secretary and provi
adequate bond coverage or its equivalent, he would be in violation of the
and the regulations. Notwithstanding such notice, respondent has contin
to engage in the business of a market agency buying livestock in commerc
a commission basis without registering with the Secretary and maintainin
adequate bond or its equivalent as required by the Act and the regulatio

Conclusions

By reason of the facts found in Finding of Fact 2 herein, the respon
has wilfully violated section 312(a) of the Act (7 U.S.C. 213(a)), and secti
201.29 and 201.30 of the regulations (9 C.F.R. 201.29, 201.30).

Order

Respondent Ozzie Gillum, his agents and employees, directly or thro
any corporate or other device, shall cease and desist from engaging in busi
in any capacity for which bonding is required under the Packers
Stockyards Act, as amended and supplemented, and the regulations, with
filing and maintaining an adequate bond or its equivalent, as required by
Act and the regulations.

Respondent shall not be registered to engage in business as a deale
market agency until he complies fully with the bonding requirements under
Act and the regulations. Pursuant to section 303 of the Act (7 U.S.C. § 2
respondent is prohibited from engaging in business as a dealer or ma
agency subject to the Act without being registered.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(
respondent is hereby assessed a civil penalty in the amount of One Thous
Five Hundred Dollars ($1,500.00).

This decision and order shall become final without further proceeding
ays after service hereof unless appealed to the Judicial Officer within 30 d
ter service (7 C.F.R. §§ 1.139, 1.145).

Copies hereof shall be served on the parties.

[This decision and order became final September 4, 1987.-Editor]

**n re: M&R LIVESTOCK, INC., WARREN H. SHRUM, LOUI
VENDLING, ROY B. BARKDULL, JR., and JOE L. BARKDULL.
&S Docket No. 6744.
)rder filed September 8, 1987.**

eter V. Train, for Complainant.
oan Bashaw Gregg, Anderson, In., for Respondent.
Order issued by Edward H. McGrail, Administrative Law Judge.

ORDER GRANTING DISMISSAL OF COMPLAINT AGAINST ROY B. BARKDULL, JR.

For good cause shown in complainant's motion, filed September 8, 1987, *It is ordered*, that the complaint issued against Roy B. Barkdull, Jr., be, and hereby is, dismissed.

In re: GEORGE L. WHITTEN.
P&S Docket No. 6879.
Decision and order filed July 28, 1987.

Edward M. Silverstein, for Complainant.
Respondent, pro se.
Decision issued by Edward H. McGrail, Administrative Law Judge.

DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 C.F.R. § 201.1 *et seq.*). The respondent was served with a copy of the complaint, and filed an answer thereto admitting all of the material allegations therein and failing to request an oral hearing. Accordingly, pursuant to sections 1.139 and 1.141 of the Rules of Practice (7 C.F.R. § § 1.139, 1.141), this Decision is issued without further procedure or hearing.

Findings of Fact

1. George L. Whitten, hereinafter referred to as the respondent, is an individual whose business mailing address is Box 113, Lena, Mississippi 39094.

2. The respondent is, and at all times material herein was:

(a) Engaged in the business of buying livestock in commerce on a commission basis; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

3. Respondent was notified by certified mail that the surety bond he maintained to secure the performance of his livestock obligations under the Act had terminated. Respondent was further notified that if he continued his livestock operations under the Act without providing adequate bond coverage or it equivalent, he would be in violation of the section 312(a) of the Act (7 U.S.C. § 213(a)) and sections 201.29 and 201.30 of the regulations issued pursuant to the Act (9 C.F.R. § § 201.29, 201.30). Notwithstanding such notice, respondent has continued to engage in the business of a market agency buying livestock in commerce on a commission basis without maintaining an adequate bond or its equivalent as required by the Act and the regulations.

Conclusions

By reason of the facts found in Finding of Fact 3 herein, respondent has wilfully violated section 312(a) of the Act (7 U.S.C. § 213(a)) and sections 201.29 and 201.30 of the regulations issued pursuant thereto (9 C.F.R. § § 210.29, 210.30).

Order

Respondent George L. Whitten, his agents and employees, directly or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act until he complies fully with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued in this proceeding terminating this suspension.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is hereby assessed a civil penalty in the amount of Five Hundred Dollars ($500.00).

The provisions of this order shall become effective on the sixth day after the Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. 1.139 and 1.145).

Copies of this decision shall be served on the parties.

[This decision and order became final September 4, 1987.-Editor]

In re: GEORGE L. WHITTEN.
P&S Docket No. 6879.
Order filed September 18, 1987.

Edward M. Silverstein, for Complainant.
Respondent, pro se.
Order issued by Edward H. McGrail, Administrative Law Judge.

SUPPLEMENTAL ORDER

On July 28, 1987, an order was issued in the above-captioned matter which, *inter alia*, suspended respondent as a registrant under the Act until he fully complied with the bonding requirements under the Act and the regulations. However, before the effective date of the July 28, 1987, order, respondent was in full compliance with the bonding requirements under the Act and the regulations. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order ed July 28, 1987, is terminated. The order shall remain in full force and ect in all other respects.

DISCIPLINARY DECISIONS

In re: CARUSO, RINELLA, BATTAGLIA CO., INC.
PACA Docket No. 2-7542.
Decision and order filed August 12, 1987.

Andrew Y. Stanton, for Complainant.
Respondent, pro se.
Decision issued by Victor W. Palmer, Administrative Law Judge.

DECISION AND ORDER

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on May 29, 1987, by the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period December 1984 through May 1986 respondent purchased, received, and accepted, in interstate and foreign commerce, from 12 sellers, 61 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $129,375.80.

A copy of the complaint was served upon respondent which complaint has not been answered. The time for filing an answer having run, and upon the motion of the complainant for the issuance of a Default Order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. 1.139).

Findings of Fact

1. Respondent, Caruso, Rinella, Battaglia Co., Inc., is a corporation, whose address is Box 1131, Albany, New York 12201.

2. Pursuant to the licensing provisions of the Act, license number 000446 was issued to respondent on September 11, 1930. This license was renewed annually, but terminated on September 11, 1986, pursuant to Section 4(a) of the Act (7 U.S.C. 499d(a)) when respondent failed to pay the required annual license fee.

3. As more fully set forth in paragraph 5 of the complaint, during the period December 1984 through May 1986, respondent purchased, received, and accepted in interstate and foreign commerce, from 12 sellers, 61 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $129,375.80.

Conclusions

Respondent's failure to make full payment promptly with respect to the 61 transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. 499b), for which the Order below is issued.

Order

A finding is made that respondent has committed willful, flagrant and ·eated violations of Section 2 of the Act (7 U.S.C. 499b), and the facts and :umstances set forth above, shall be published.

This order shall take effect on the 11th day after this Decision becomes ıl.

Pursuant to the Rules of Practice governing procedures under the Act, . Decision will become final without further proceedings 35 days after rice hereof unless appealed to the Secretary by a party to the proceeding ıin 30 days after service as provided in sections 1.139 and 1.145 of the es of Practice (7 C.F.R. 1.139 and 1.145).

Copies hereof shall be served upon parties.

This decision and order became final September 24, 1987.-Editor]

: JOSEPH GALIOTO & SONS, INC.
A Docket No. 2-7477.
sion and order filed July 27, 1987.

rd M. Silverstein, for Complainant.
't Saul Molnar, for Respondent.
on issued by Edward H. McGrail, Administrative Law Judge.

DECISION AND ORDER

Preliminary Statement

his is a disciplinary proceeding under the Perishable Agricultural nodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*) hereinafter ·ed to as the "Act", instituted by a complaint filed on March 31, 1987, ; Deputy Director, Fruit and Vegetable Division, Agricultural Marketing :e, United States Department of Agriculture. It is alleged in the laint that during the period May 1985 through January 1986, respondent ased, received, and accepted, in interstate and foreign commerce, from eller, 97 lots of bananas and one lot of pineapples, all being perishable ıltural commodities, but failed to make full payment promptly of the d purchase prices, in the total amount of $320,396.38.

copy of the complaint was served upon respondent which complaint has :en answered. The time for filing an answer having run, and upon the n of the complainant for the issuance of a Default Order, the following on and Order is issued without further investigation or hearing pursuant tion 1.139 of the Rules of Practice (7 C.F.R. 1.139).

Findings of Fact

Respondent, Joseph Galioto & Sons, Inc., is a corporation, which also as Morris County Banana Supply Company, whose address is 34 ıfield Avenue, Bloomfield, New Jersey 07003.

2. Pursuant to the licensing provisions of the Act, license number 2001 was issued to respondent on April 5, 1963. This licence was renewed annua but terminated on April 5, 1986, pursuant to Section 4(a) of the Act (7 U.S 499d(a)) when respondent failed to pay the required annual license fee.

3. As more fully set forth in paragraph 5 of the compliant, during t period May 1985 through January 1986, respondent purchased, received, a accepted in interstate and foreign commerce, from one seller, 97 lots bananas and one lot of pineapples, all being perishable agricultu commodities, but failed to make full payment promptly of the agreed purcha prices, in the total amount of $320,396.38.

Conclusions

Respondent's failure to make full payment promptly with respect to t 98 transactions set forth in Finding of Fact No. 3, above, constitutes willf repeated and flagrant violations of Section 2 of the At (7 U.S.C. 499b), f which the Order below is issued.

Order

A finding is made that respondent has committed willful, flagrant a repeated violations of Section 2 of the Act (7 U.S.C. 499b), and the facts a circumstances set forth above, shall be published.

This order shall take effect on the 11th day after this Decision becom final.

Pursuant to the Rules of Practice governing procedures under the A this Decision will become final without further proceedings 35 days aft service hereof unless appealed to the Secretary by a party to the proceedi within 30 days after service as provided in sections 1.139 and 1.145 of t Rules of Practice (7 C.F.R. 1.139 and 1.145).

Copies hereof shall be served upon parties.

[This decision and order became final September 8, 1987.-Editor]

LAMO PACKING CO. v. A.G. SHORE COMPANY, INC.
ACA Docket No. 2-7617.
rder issued September 14, 1987.

ler issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural ımmodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely mplaint was filed in which complainant seeks reparation against respondent the amount of $3,556.00 in connection with transactions involving the pment of lettuce in interstate commerce.

ly letter dated August 18, 1987, complainant notified the Department that ıo longer wished to pursue its claim.

Accordingly, the complaint is hereby dismissed

Copies of this order shall be served upon the parties.

UE ANCHOR, INC. v. R&C PRODUCE DISTRIBUTORS, INC.
CA Docket No. 2-7583.
ler issued September 1, 1987.

r issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural nmodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely ıplaint was filed in which complainant seeks reparation against respondent he amount of $1,521.15 in connection with a transaction involving the ıment of mixed perishable agricultural commodities in interstate commerce.

letter dated August 3, 1987, complainant notified the Department that lement had been reached.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

AMANO BROS., INC. v. HARBOR BANANA DISTRIBUTORS, INC., 'a WHOLESALE FRESH FOODS.
CA Docket No. 2-5878.
er issued September 1, 1987.

issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultur Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A time complaint was filed in which complainant seeks reparation against responde in the amount of $5,920.00 in connection with a transaction involving th shipment of mangoes in interstate commerce.

On February 22, 1982, this matter was stayed pending completion respondent's bankruptcy.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

CAMBRIDGE FARMS, INC. v. H. R.BUSHMAN & SONS, INC.
PACA Docket No. 2-7022.
Decision and order issued September 3, 1987.

Evidence - Weight given to verified statements.

Statements submitted by complainant under shortened procedure from person with person knowledge of the facts were all unverified and could not be given same weight as verifie statements from respondent's witness. Complainant failed to meet its burden of proving b a preponderance of the evidence that a binding contract was entered into between the partie

Decision issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultura Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timel complaint was filed in which complainant seeks an award of reparation agains respondent in the amount of $7,030.00 in connection with the shipment i interstate commerce of a truckload of peaches.

A copy of the report of investigation made by the Department was serve upon the parties. A copy of the formal complaint was served upo respondent, which filed an answer thereto denying liability to complainant.

The amount claimed in the formal complaint does not exceed $15,000.00 and the shortened method of procedure provided in section 47.20 of the Rule of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, th verified pleadings of the parties are considered a part of the evidence in th case, as is the Department's report of investigation. In addition, the partie were given an opportunity to file evidence in the form of sworn statements Complainant filed an opening statement, respondent filed an answering statement, and complainant filed a statement in reply. Both parties filed a brief.

Findings of Fact

1. Complainant, Cambridge Farms, Inc., is a corporation whose address is 40 Strafello Drive, Avon, Massachusetts.

2. Respondent, H. R. Bushman & Sons, Inc., is a corporation whose ddress is 54 Produce Row, St. Louis, Missouri. At the time of the transaction nvolved herein, respondent was licensed under the Act.

3. On or about May 16, 1985, complainant shipped a truckload of U.S. 1 Extra Fancy 2 inch and up Camden variety, Spring Hill label, peaches from ading point in South Carolina, to respondent in St. Louis, Missouri.

4. Following arrival on Monday, May 20, 1985, at respondent's place of usiness, respondent promptly rejected the peaches to complainant.

5. The formal complaint was filed on September 3, 1985, which was within ine months after the cause of action alleged herein accrued.

Conclusions

Complainant alleges that the peaches were sold to respondent for a price n a delivered basis. Respondent alleges that a firm agreement for shipment as never reached between the parties, and that while certain matters mained to be decided prior to shipment, respondent cancelled the order. oth parties submitted statements throughout the proceeding by the persons ho were directly involved in the negotiations relative to the peaches. owever, while respondent submitted sworn affidavits, the record contains no orn affidavit submitted by complainant from the person who was directly volved in the negotiations. In fact, the only sworn affidavit submitted in this oceeding by complainant is the complaint itself which was sworn to by even L. Cohen, General Manager of complainant, and there is no showing at Mr. Cohen had any personal knowledge of the negotiations which took ace relative to the peaches. The act specifically provides (7 U.S.C. § 499f) at in non-oral hearings "Proof in support of the complaint and in support of spondent's answer may be supplied in the form of depositions of *verified* tements of fact." (Emphasis supplied) The Rules of Practice also provide r the submission of such proof "in the form of verified statements or positions." The sample form given to complainant by the Fruit and getable Division to serve as a guide for the filing of the complaint ntained an example of the required form of verification. Complainant lowed this example when submitting the formal complaint which was sworn by Steven L. Cohen. In addition, prior to the initiation of the shortened ocedure under which sworn statements were to be submitted in support of pleadings, both complainant and respondent were furnished with a three- ge document with the following heading "THE FOLLOWING FORMATION COVERS SOME IMPORTANT AND FREQUENTLY ISUNDERSTOOD POINTS RELATIVE TO SUBMISSION OF IDENCE UNDER THE SHORTENED PROCEDURE (SEE SECTION 20 OF THE RULES OF PRACTICE; 7 C.F.R. 47.20). PLEASE READ CAREFULLY." (Emphasis in original) Near the end of this document der the heading "IMPORTANT" was the following paragraph:

> *EACH* person making a statement as outlined above should verify the statement before a notary or other officer authorized to administer oaths. This simply means that each individual swears or affirms that the statement which he has made is the

truth, before a notary, and that the notary then notes on the statement that the document was signed *and sworn* to by the person making the statement. Notarization alone, or acknowledgement before a notary is NOT sufficient. (Emphasis in original)

In spite of these admonitions, complainant again and again submitt statements which were not made under oath but simply acknowledged befo a notary . Under the circumstances, the testimony of complainant's witne cannot be given the same weight as that of respondent's witness. *S Southland Produce Company v. Friendly Brothers Produce*, 29 Agric. Dec. 12 (1970). We find that complainant has failed to meet its burden of proving a preponderance of the evidence that a binding contract relative to t peaches was entered into between the parties. The complaint should dismissed.

Order

The complainant is dismissed.

Copies of this order shall be served upon the parties.

BRUCE CHURCH, INC. v. LUNA CO., INC., d/b/a BAKERSFIEL PRODUCE & DISTRIBUTING CO.
PACA Docket No. 2-7059.
Decision and order issued September 2, 1987.

F.o.b. contract and suitable shipping condition - Burden of proof.

Where seller in f.o.b. contract placed lettuce on board the truck at a temperature of 33-36 the lettuce was in suitable shipping condition. Where the lettuce arrived at destination at temperature range of 48° to 70°, the buyer was responsible for any damage resulting fro the excessive temperature. The buyer therefore failed to prove a breach of contact complainant and was liable for the entire contract price.

Peter V. Train, Presiding Officer.
Complainant, pro se.
Respondent, pro se.
Decision issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultura Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafte referred to as the Act. A timely complaint was filed in which complainan seeks a reparation award against respondent in the amount of $3,189.52, i connection with a sale of a load of lettuce in interstate commerce.

A copy of the formal complaint and a copy of the Department's report o nvestigation were served upon respondent. A copy of the report o nvestigation was served upon complainant.

Respondent filed an answer admitting the purchase of the lettuce from complainant, but alleging that the lettuce was not of the quality and condition represented by complainant.

Since the amount claimed in damages does not exceed $15,000.00, the shortened procedure provided for in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) applies. Pursuant to such procedure, the parties were given an opportunity to submit evidence in the form of verified statements. Complainant filed an opening statement. Neither party filed a brief.

Findings of Fact

1. Complainant, Bruce Church, Inc., hereinafter referred to as complainant, is a corporation whose post office address is P. O. Box 80599, Salinas, California 93912.

2. Respondent, Luna Co., Inc., hereinafter referred to as respondent, is a corporation doing business as Bakersfield Produce & Distributing Company, whose address is 1901 F. Street, Suite B, Bakersfield, California 93301.

3. Both parties are, and at the time of the transactions involved herein were, licensed under the Act.

4. On May 10, 1985, in the course of interstate commerce, complainant orally contracted to sell to respondent for the accounts of Winn-Dixie, Sarasota, Florida, and Winn-Dixie, Tampa, Florida, 504 cartons of lettuce at $.00 per carton plus vacuum cooling and floor racks for a total f.o.b. price of $,402.00.

5. The lettuce was shipped on May 10, 1985 and arrived at destination on May 15, 1985.

6. A federal inspection was made of the condition of 216 cartons of lettuce arriving at Tampa, Florida. The relevant results were as follows:

> INSPECTION LOCATION: Applicant's (Winn-Dixie, Tampa, Florida) Warehouse
> PRODUCTS INSPECTED: Lettuce iceberg type marked "Friendly lettuce" Bruce Church, Inc., Salinas, California, 2 doz heads
>
> TEMPERATURE OF PRODUCT: 48 to 70 °F
> CONDITION: *Wrapper Leaves* Average 2% decay.
> *Head Leaves*: In most cartons 1 decayed head, many 4 to 6 heads average 10% Bacterial Soft Rot generally initial to early, few advanced affecting ¼ of head.

7. The inspection showed the temperature to be 48 to 70° even though the temperature recorder operating during the trip indicated that the temperature was maintained at 36° for almost the entire trip with a short period of 39° and a jump to 55° at arrival.

8. Respondent's customer refused to take the lettuce. Therefore, complainant resold the lettuce to Warren Wheeler, Inc., on a delivered basis at $4.50 per carton for a total of $2,268.00.

9. Respondent also deducted in a subsequent transaction the sum $2,055.52 for freight and diversion charges associated with this load, leavi a net return to complainant of $212.48.

10. The formal complaint was filed on October 30, 1985, which was with nine months after the cause of action herein accrued.

Conclusions

It is undisputed that the lettuce inspected at destination in Tampa, Florid failed to meet "good delivery" requirements. (7 C.F.R. § 46.44) It is al undisputed that the temperature at destination ranged from 48 to 70 °F, whi is clearly excessive. The dispute here is over who must accept responsibili for the excessive temperature.

In a f.o.b. transaction such as herein, the complainant's obligation as t seller was to place the lettuce on the truck in suitable shipping conditi which is defined as a condition which, if the lettuce was handled under norm transportation service, and conditions, will assure delivery without abnorm deterioration at the contract destination. (7 C.F.R. § 46.43(j)). The buy (respondent herein) assumes all risk of damage and delay in transit not caus by the seller irrespective of how the shipment is billed (7 C.F.R. § 46.43(i)

Additionally, it should be noted that the lettuce was inspected in the Win Dixie warehouse. Having unloaded the lettuce, respondent is deemed to ha accepted the goods. 7 C.F.R. § 46.2(dd); *Theron Hooker Co. v. Ben Gatz C* 30 Agric. Dec. 1109 (1971) It is thus liable to complainant for the contra price, less provable damages sustained by any breach of contract complainant. As noted above, the dispute herein is over who bea responsibility for the excessive temperature of the lettuce at destinatio Although the temperature recorder on the truck indicated that t temperature of the load was kept at a fairly constant temperature of 36° wi a minor variation of 39°, the inspection report indicates that the temperatu of the lettuce a few hours after arrival ranged from 48 to 70°F. Clearly, t excessive temperature is a cause of the condition defects found herein, y neither party adequately addressed the discrepancy between the temperatu recorder reading on the truck and the readings obtained by the inspecto Exhibits 8 and 9 to the complaint, however, are bills of lading in which t truck driver certifies that the temperature of the lettuce at the time of loadi was between 33 and 36°F. The temperature 5 days later, a transit tim respondent acknowledges to be normal, is from 48 to 70°. Respondent do not challenge that temperature, but instead merely asserts that such temperature is understandable because decay generates its own hea (Exhibit 4, Report of Investigation) It is, however, extremely unlikely th such a discrepancy could be explained by decay, especially where the decay only 12%. Given that the driver, respondent's agent, certified a prop temperature of the lettuce at the time of loading, complainant has met i burden of showing that the lettuce was put on board in suitable shippin condition. Whether the excessive temperature was caused by imprope refrigeration in transit or in the Winn-Dixie warehouse, or by some oth cause is unknown, but in any event respondent is liable. In this regard, it significant that there is no showing that the temperature recording device wa calibrated or otherwise shown to be accurate.

Respondent has failed to prove by the preponderance of evidence that complainant breached the contract. Accordingly, respondent is liable for the entire contract price of $3,402.00. After deductions for freight and handling charges were taken by respondent the net funds remitted to complainant on a resale of the lettuce was $212.48. This leaves a total of $3,189.52 unpaid. The failure of respondent to pay this amount to complainant is a violation of section 2 of the Act. Reparation should be awarded to complainant in the amount of $3,189.52, with interest.

Order

Within 30 days from the date of this order, respondent shall pay the complainant, as reparation, $3,189.52, with interest thereon at the rate of 13 percent per annum from June 1, 1985, until paid.

Copies hereof shall be served upon the parties.

JOSEPH CIMINO FOODS, INC. v. UNITED FRUIT & PRODUCE CO.
PACA Docket No. 2-6983.
Decision and order issued September 21, 1987.

Having accepted two shipments of produce, it is receiver's burden to prove breach of contract and damages, or a modification of contract - Agency may be express or apparent -Ordinarily agent has no complied authority to make an allowance.

Respondent claimed there was a modification of the contract on the basis of its claim that there were condition problems with the garlic on arrival. Complainant denied that there was modification and claimed he instructed his broker to request an inspection and, if necessary, accounting. No accounting or inspection was ever provided by respondent.

y M. Hochberg, Presiding Officer.
Complainant, pro se.
Respondent, pro se.
Decision issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter "the Act." A timely complaint was filed in which complainant seeks an award of reparation against respondent in the total amount of $4,300.00 in connection with the sale of two truckloads of garlic in interstate commerce. A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent. Respondent filed an answer on October 16, 1985, denying any liability to the complainant.

Since the amount claimed as damages does not exceed $15,000.00, the shortened method of procedure set forth in the Rules of Practice (7 C.F.R. 47.20) is applicable. Under this procedure, the verified pleadings of the

parties are considered a part of the evidence herein, as is the Department's report of investigation. The parties also filed additional evidence in the form of sworn statements. Both parties were given the opportunity to file briefs, but neither party did so.

Findings of Fact

1. Joseph Cimino Foods, Inc., is a corporation whose business mailing address is 557-A Alma Street, San Jose, California 95125.

2. United Fruit & Produce Co. is a corporation whose business mailing address is 51-71 Produce Row, St. Louis, Missouri 63102. At the time of the transactions involved herein, respondent was licensed under the Act.

3. On or about April 2, 1984, in the course of interstate commerce, complainant by oral contract sold to respondent 150 cartons of bulk jumbo size garlic at an agreed price of $15.00 per carton, f.o.b., and 100 cartons of cello box garlic at an agreed price of $13.50 per carton, f.o.b., for a total invoice amount of $3,600.00.

4. On or bout April 12, 1984, in the course of interstate commerce, complainant by oral contract sold to respondent 100 cartons of bulk x-jumbo garlic at an agreed price of $21.00 per carton, f.o.b., and 100 cartons of cello box garlic at an agreed price of $13.44 per carton, f.o.b., for a total invoice amount of $3,444.00.

5. The contracts referred to in Findings of Fact Nos. 3 and 4 above, were negotiated by G.S. Suppiger Co., a broker located in St. Louis, Missouri, on behalf of complainant, and by an authorized officer or employee of the respondent.

6. On or about April 2, 1984, complainant shipped from loading point in California to respondent in Missouri, the kind, quality, grade and size of commodity called for by the contract referred to in Finding of Fact No. 3 above.

7. On or about April 12, 1984, complainant shipped from loading point in California to respondent in Missouri, the kind, quality, grade and size of commodity called for by the contract referred to in Finding of Fact No. 4 above.

8. Upon arrival of the first load, respondent reported alleged condition problems to complainant's broker, who in turn communicated this information to complainant. Complainant responded that if a federal inspection confirmed these condition problems, complainant would be willing to modify the contract to a consignment sale with the final remittance to the complainant to be accompanied by an accounting of labor costs, product lost and the sales of the remaining cartons.

9. Respondent accepted the first shipment and issued a check to complainant in the amount of $1,000.00 in connection with this shipment. However, no federal inspection was performed and no accounting was provided to the complainant.

10. Respondent accepted the second load and issued a check to complainant in the amount of $1,744.00 in connection with this shipment. No inspection was performed, nor was any accounting or other explanation of the deduction on this load provided to complainant.

11. Complainant did not immediately deposit the two payment checks, pending a release from respondent. In response to the filing of this complaint,

t authorized the cashing of these checks as the undisputed amoun he above transactions, without prejudice to the rights of either part ct to the disputed balance.

 informal complaint in this proceeding was filed on December 31 h was within nine months after the cause of action accrued. The mplaint was then filed on July 2, 1985.

Conclusions

cord supports an order requiring respondent to pay the $4,300.0 educted on the two loads of garlic in question. The original contrac not disputed and it is clear that respondent accepted both loads o herefore, it becomes respondent's burden to prove a breach o d its damages from that breach, or a modification of a contract es *Fruit Co. v. Banana Supply Co.*, 16 Agric. Dec. 937 (1957); *Ro oduce v. John P. Miller Wholesale Produce*, 33 Agric. Dec. 871 (1974) its bare assertions that first complainant's broker, and late nt agreed to the allowances taken, respondent has failed to provid of accounting or other evidence showing nonconformity with th erms or showing respondent's disposition of the garlic. The lack c unting not only undermines respondent's claim that complainan the allowances, but also precludes a finding that respondent suffere ges as a result of breach of contract on these shipments. Moreove pting respondent's assertion that complainant's broker agreed to th , there is no showing that the broker had actual or apparen for that agreement. Complainant asserts that his broker had n uthority to make an allowance and, ordinarily, a broker has n uthority to make an allowance. *Mendelson-Zeller Co. v. Farmer Corporation*, 28 Agric. Dec. 944 (1969).

rt, respondent has failed to carry its burden of proof to support it ns that there was a modification of the contract wherein complainan o the deductions which respondent claims; *D.M. Steele & Son* *Produce Distributors, Inc.*, 17 Agric. Dec. 913 (1958); *Merlino* *Pettinella & Sons*, 18 Agric. Dec. 1089 (1959); or that the garli did not conform to the contract giving rise to damages from *Sunny Ridge Farms v. Edward Dilatush & Co.*, 20 Agric. Dec. 96 *Morris Karp & Son v. Eastern Potato Dealers*, 20 Agric. Dec. 124

rdingly, respondent owes to complainant the sum of $4,300.0 ent's failure to pay complainant this amount is a violation of sectio Act for which reparation should be awarded.

Order

in thirty days from the date of this order, respondent shall pay ant, as reparation, $4,300.00 with interest thereon at the rate of 13 m from May 1, 1984, until paid.

es of this order shall be served upon the parties.

COLORADO POTATO GROWERS EXCHANGE v. MORENO PRODUCE COMPANY.
PACA Docket No. 2-6179.
Order issued September 24, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $14,555.00 in connection with a transaction involving the shipment of potatoes in interstate commerce.

On August 1, 1983, this matter was stayed pending completion of respondent's bankruptcy.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

NICK DELIS COMPANY, INC. v. HENRY A. POLLACK RIVERHEAD CORP.
PACA Docket No. 2-7314.
Order issued September 14, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $37,499.33 in connection with a transaction involving the shipment of six railcar loads of potatoes, a perishable agricultural commodity, shipped in interstate commerce.

Complainant filed a letter, on August 14, 1987, in which it states it is withdrawing its complaint in consideration for respondent's withdrawal of its counterclaim. Respondent filed a letter, on August 17, 1987, in which it states it is withdrawing its counterclaim in consideration for complainant's withdrawal of its claim.

Accordingly, the complaint and counterclaim are hereby dismissed.

Copies of this order shall be served upon the parties.

DEL MONTE BANANA COMPANY v. HARBOR BANANA DISTRIBUTORS, INC., a/t/a WHOLESALE FRESH FOODS.
PACA Docket No. 2-5887.
Order issued September 1, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $40,815.30 in connection with a transaction involving the shipment of pineapples and bananas in interstate commerce.

On February 22, 1982, this matter was stayed pending completion of respondent's bankruptcy.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

DOVEX INVESTMENT CORPORATION, d/b/a DOVEX PACKING COMPANY v. T-G APPLE INCORPORATED.
PACA Docket No. 2-6821.
Order issued September 24, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $10,563.14 in connection with six transactions involving the shipment of apples in interstate commerce.

On August 29, 1985, this matter was stayed pending completion of respondent's bankruptcy.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

ROBERT H. AND SAUNDRA E. DOWNES v. PHILLIP R. WELLER d/b/a RICHARD WELLER.
PACA Docket No. 2-6382.
Order issued September 23, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $8,757.71 in connection with a transaction involving the shipment of potatoes in interstate commerce.

On April 26, 1984, this matter was stayed pending completion of respondent's bankruptcy.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

EVERKRISP VEGETABLES, INC. v. J. RANDAZZO & SONS, INC.
PACA Docket No. 2-6982.
Decision and order issued September 2, 1987.

F.o.b. sale -- Warranty of suitable shipping condition - Transportation -- normal in spite of freezing temperatures - Damages - Weight -- failure to prove breach in regard to - Protection agreement -- market decline.

Complainant sold and shipped to respondent a load of grapes f.o.b. with full market protection. Temperature recorder tape showed freezing temperatures in route but Federal inspection at destination showed no damages attributable to freezing. Warranty of suitable shipping condition found applicable and Federal inspection showed breach by complainant. Damages awarded on basis of difference between value of grapes if they had been as warranted as shown by applicable market reports and value they actually had as shown by respondent's resale. A breach in regard to weight was alleged but held not to have been adequately proven due to failure to secure Federal inspection as to weight. Amount allowable under protection agreement was set off against balance otherwise found due from respondent.

George S. Whitten, Presiding Officer.
Thomas R. Oliveri, for Complainant.
Respondent, pro se.
Decision issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $11,658.70 in connection with the shipment in interstate commerce of a truckload of grapes.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant.

The amount claimed in the formal complaint does not exceed $15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, respondent filed an answering statement, and complainant filed a statement in reply. Both parties filed a brief.

Findings of Fact

1. Complainant, Everkrisp Vegetables, Inc., is a corporation whose address is P. O. Box 25, Tolleson, Arizona.

2. Respondent, J. Randazzo & Sons, Inc., is a corporation whose address is Unit 9, 4000 Orange Avenue, Cleveland, Ohio. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On or about June 9, 1984, complainant sold to respondent one truckload of grapes consisting of 882 cartons of Perletts at $15.85 per carton and 318 cartons of Flame at $19.85 per carton plus 70¢ per carton for cooling and 15¢ per carton for brokerage, or a total f.o.b. invoice price of $21,312.00.

4. The grapes were shipped from loading point in the State of Arizona on June 9, 1984, to respondent in Cleveland, Ohio. The truckled of grapes arrived at respondent's place of business in Cleveland, Ohio, at 11:27 a.m. on June 13, 1984. Respondent unloaded the grapes into its cooler on the afternoon of June 13, and on June 14, at 7:00 a.m., the grapes were federally inspected while stacked in respondent's cooler with the following results in relevant part:

> Products Inspected: Table GRAPES in lugs labelled "Vantica Net. Wt. 22 lbs, Produce of Mexico", stamped "Distributed by Evercrisp Vegetables, Inc., Tolleson, Arizona", also stamped "Perlett" or "Flame", also stamped "Arizona, Federal State Lot 105-50". Applicant states 876 lugs of Perlett grapes and 318 lugs of Flame grapes.
>
> . . .
>
> Condition of Pack: Each lot; well filled, 6 way paper or fiberboard lined.
> Temperature of Product: Each lot; in various lugs 37 to 42 degrees.
> Condition: Each lot: Berries are generally firm and firmly attached to cat stem. Stems are mostly green and pliable, many stems generally in the upper two layers are watersoaked, translucent in appearance (characteristic of freezing injury). Perlett lot: Shattered berries average 2%. Damage by bruising generally occurring next to sides, bottoms and lids of lugs ranges from 7 to 23%, average 13%. Damage by internal discoloration averages 1%. Decay averages less than 1/2 of 1%. Flame lot: Shattered berries average 1%. Decay averages less than 1/2 of 1%.

5. A Ryan temperature thermometer was included on the truck and the tape from such thermometer showed that the temperatures on the truck ranged generally between 20 and 25 degrees during the first half of the trip and between 25 and 30 degrees during the second half of the trip. The thermometer was returned to Ryan Instruments, Incorporated, for testing, and was determined to be reading approximately 3 degrees low throughout the entire temperature range.

6. An informal complaint was filed on February 11, 1985, which was within nine months after the cause of action herein accrued.

Conclusions

It is clear from the record herein that respondent accepted the grapes by unloading such grapes from the truck and thus became liable to complainant for the full purchase price, less any damages shown to have resulted from any breach of contract on the part of complainant and also less any amount which respondent proved itself to be entitled to as a result of the agreement between the parties for market protection. Respondent has alleged that the condition of the grapes at time of arrival in Cleveland, Ohio, was such that complainant should be considered to have breached the f.o.b. contract of sale. Under the regulations (7 C.F.R. § 46.43(j)), a warranty of suitable shipping condition is stated to pertain to f.o.b. sales. This warranty is stated to mean:

> That the commodity, at time of billing, is in a condition which, if the shipment is handled under normal transportation service and conditions, will insure delivery without abnormal determination at the contract destination agreed upon between the parties . . .

Complainant contends that the temperatures reflected by the Ryan temperature tape show that transportation service and conditions were abnormal so as to make the warranty of suitable shipping conditions inapplicable to these grapes. The tape certainly shows below freezing air temperatures even taking into consideration the three degrees by which the thermometer was out of calibration. However, the federal inspection at destination, while taking note of the fact that many of the stems of the grapes were watersoaked and translucent in appearance in a manner characteristic of freezing injury, did not find that there was any scoreable damage in the grapes attributable to freezing. This is understandable in light of the fact that the average freezing point of these grapes is in the 27 degree F. range. *See, Market Disease of Grapes and Other Small Fruits*, Agricultural Handbook No. 189, p. 13. Although the transit temperatures were abnormal for a period of time, the below freezing temperature did not adversely affect the condition of the grapes as shown by the inspection. Consequently, the f.o.b. suitable shipping condition warranty is applicable. The amount of damage shown by the federal inspection present in the Perlett lot grapes exceeds that which can be allowed for good delivery. Consequently, we find a breach of contract on the part of complainant relative to the Perlett lot of grapes. The amount of damage in the Flame lot of grapes was not excessive and we find that there was no breach of contract relative to the Flame grapes.

Respondent's acceptance of the grapes made it liable to complainant for the full f.o.b. purchase price of such grapes less the damages resulting from complainant's breach of contract. The measure of damages for breach of warranty in regard to the accepted goods is the difference at the times and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted. *See, Morris v. Del Valle*, 30 Agric. Dec. 1367 (1971); *Uniform Commercial Code*, § 2-714. As to the value of the goods accepted, this may be evidenced by the proceeds obtained

by the receiver on a prompt and proper resale on such goods. *Kirby & Little Packing Co. v. United Fruit & Produce Co.*, 16 Agric. Dec. 1066 (1957). The value that a shipment wold have had if it met contract requirements may be proven by the prices shown in applicable Market News Service reports or, alternatively, in the absence of market prices, we will accept as indicative of such value, the f.o.b. contract price, plus freight to destination. *Santa Clara Produce v. Caruso Produce, Inc.*, 41 Agric. Dec. 2279 (1982). Market News Service reports are not available for Cleveland, Ohio, during the period in question and, therefore, we will use the reports for Chicago. The Chicago wholesale fruit and vegetable report for June 14, 1984, shows that Perlett grapes in 22 pound cartons were selling for $18.00 to $20.00, mostly $18.00 to $19.00, some $16.50 to $17.00. Using the lower of the "mostly" quotation, the Perlett grapes would have had a value of $15,876.00. Respondent's accounting shows that such grapes were resold for a gross amount of $8,582.00. This amount subtracted from the value they should have had if they had been as warranted leaves $7,294.00 as respondent's basic damages in regard to such grapes. Respondent's total damages, therefore, amount to $8,790.25. This amount subtracted from the $21,312.00 f.o.b. purchase price of the grapes leaves $12,521.75 as respondent's basic liability to complainant for the load of grapes. Of this amount, respondent has already paid complainant $9,653.30, which leaves $2,868.45 still due and owing from respondent to complainant. Respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

Two matters remain to be discussed. First, respondent contended that both the Perlett and the Flame grapes were underweight on arrival. Respondent submitted testimonial evidence in regard to its own private weighing of sample of each lot of grapes to substantiate its claim. However, respondent had every opportunity to have the weight of the grapes verified by federal inspector and chose not to do so. We therefore decline to find a breach of contract on the part of complainant in regard to the weight of the subject grapes. Second, respondent has contended and we have found that the contract between the parties provided for protection due to market decline. However, respondent did not submit any evidence in regard to market decline and consequently, we are not able to make any award in respondent's favor in this regard.

Order

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, $2,868.45, with interest thereon at the rate of 13% per annum, from July 1, 1984, until paid.

Copies of this order shall be served upon the parties.

FLORIDA SALES CO., INC. v. PAMCO AIR FRESH, INC.
PACA Docket No. 2-7187.
Order issued September 10, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER AFFORDING COMPLAINANT OPPORTUNITY TO AMEND COMPLAINT TO ADD PARTIES RESPONDENT

An oral hearing was held on February 11 and 12, 1987, in Los Angeles, California, at the termination of which the presiding officer ruled that the hearing would be held open pending the taking of further evidence. He also stated at page 614 of the transcript:

> In due course, I will issue a ruling based on the evidence affording Florida the opportunity to file a further complaint as against Vista McAllen, Nogales, Vista McAllen, and what see have called MEG--I'll have to look and we what its actual terminology is.

A thorough review of the evidence in this proceeding reveals that a fraud against creditors occurred insofar as complainant was unaware at the time it sold the produce involved in this proceeding that the true purchaser of the produce was either Vista McAllen, Nogales, Inc., or M.E.G. Distributors, Inc., and that the owners of Vista McAllen, Inc., were also the owners of Vista McAllen, Nogales, and deeply involved in the day-to-day business of Vista McAllen, Nogales, to such an extent Vista McAllen may be liable for any produce debts owing to complainant. It is further found that complainant could not have known until the hearing that the above three licensees under the Perishable Agricultural Commodities Act may, jointly or severally, be liable to it for the produce sold.

In view of the above, it is ordered that complainant shall have 20 days from the date of this Order to file a Complaint against whichever of the above three named corporations it desires to bring an action against with respect to the issues involved in this proceeding. Such proceeding shall be separate from this proceeding for purposes of judicial efficiency.

FRANK'S DISTRIBUTING, INC. v. FOOD SERVICE INDUSTRIES, INC., a/t/a EASTERN PACIFIC PICKLE CO.
PACA Docket No. 2-6148.
Order issued September 24, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent

the amount of $21,588.15 in connection with transactions involving the shipment of cucumbers in interstate commerce.

On April 27, 1984, this matter was stayed pending completion of respondent's bankruptcy.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

FRESH WESTERN MARKETING v. MORENO PRODUCE COMPANY.
PACA Docket No 2-6232.
Order issued September 23, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $1,467.50 in connection with transactions involving the shipment of lettuce in interstate commerce.

On May 5, 1983, this matter was stayed pending completion of respondent's bankruptcy.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

GATOR PRODUCE SALES, INC. v. FAVA & COMPANY, INC.
PACA Docket No. 2-6374.
Order issued September 24, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $8,569.00 in connection with a transaction involving the shipment of mixed vegetables in interstate commerce.

On December 19, 1983, this matter was stayed pending completion of respondent's bankruptcy.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

RAYMOND K. GRAY d/b/a KEN GRAY PRODUCE v. VICTOR FOODS, INC., and/or RINGO #7, INC.
PACA Docket No. 2-6527.
Order issued September 23, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $11,090.75 in connection with a transaction involving the shipment of produce in interstate commerce.

On May 7, 1985, this matter was stayed pending completion of respondent's bankruptcy.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

RAYMOND K. GRAY d/b/a KEN GRAY PRODUCE v. VICTOR FOODS, INC., and/or RINGO #7, INC.
PACA Docket No. 2-6528.
Order issued September 23, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $10,723.50 in connection with a transaction involving the shipment of produce in interstate commerce.

On May 7, 1985, this matter was stayed pending completion of respondent's bankruptcy.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

RAYMOND K. GRAY d/b/a KEN GRAY PRODUCE v. VICTOR FOODS, INC., and/or RINGO #7, INC.
PACA Docket No. 2-6529.
Order issued September 23, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent

in the amount of $11,957.50 in connection with a transaction involving the shipment of produce in interstate commerce.

On May 7, 1985, this matter was stayed pending completion of respondent's bankruptcy.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

RAYMOND K. GRAY d/b/a KEN GRAY PRODUCE v. VICTOR FOODS, INC., and/or RINGO #7, INC.
PACA Docket No. 2-6530.
Order issued September 23, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $7,025.00 in connection with a transaction involving the shipment of produce in interstate commerce.

On May 7, 1985, this matter was stayed pending completion of respondent's bankruptcy.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

GULF LAKE PRODUCE CO. v. MAURICE D. HILL, d/b/a DIAMOND T FRUIT CO., a/t/a DIAMOND T FRUIT SALES.
PACA Docket No. 2-6714.
Order issued September 1, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultur Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A time complaint was filed in which complainant seeks reparation against responde in the amount of $93,034.68 in connection with transactions involvin shipments of peaches in interstate commerce.

On June 21, 1985, this matter was stayed pending completion c respondent's bankruptcy.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

VERNON HAUCH d/b/a VERNON HAUCH FARMS v. TERRIFIC TOMATO COMPANY.
PACA Docket No. 2-7196.
Order issued September 1, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $58,179.25 in connection with transactions involving the shipment of 27,754 twenty-five pound cartons of fresh tomatoes.

By letter dated March 24, 1987, complainant notified the Department that it had filed an identical action in the United States District Court for the Western District of Michigan, and authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

PHILLIPS A. HAWMAN and HAWMAN FARMS, INC. v. G & T TERMINAL PACKAGING CO., INC.
PACA Docket No. 2-6898.
Decision and Order issued September 11, 1987.

Silence of a principal with knowledge of actions of his broker becomes ratification - An agency may be created by either express or apparent authority - An agency may be implied from previous similar dealings.

Complainant, through its broker, sold five carlots of potatoes to respondent, through its broker, on a price protection on arrival basis. Both brokers agreed that reductions from initially quoted prices of $15.00 and $14.00/cwt to $10.00/cwt took into account both market decline and condition problems.

Held; The brokers negotiated a final price to be paid on the shipments and respondent is bound by that agreement on the basis of his broker's apparent authority to negotiate the allowance.

Jory M. Hochberg, Presiding Officer.
Complainant, pro se.
Linda Strumpf, for Respondent.
Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), hereinafter "the Act". On March 5, 1985, complainant filed a formal complaint in which complainant sought an award of reparation against respondent in the amount of $67,740.78 in connection with the sale of five carlots of potatoes in interstate commerce.

A copy of the report of investigation prepared by the Department was ned on each of the parties, and respondent was served with a copy of the mplaint. In response to the complaint, respondent paid $34,520.30 to mplainant as the undisputed amount owed with respect to the alleged ansactions. Respondent also filed an answer to the complaint denying any ther liability thereunder, and requesting an oral hearing. The oral hearing as held on August 19, 1986, in New York, New York. One witness testified r complainant and two witnesses testified for respondent. Complainant troduced four exhibits and respondent introduced eighteen exhibits.

Findings of Fact

1. Complainant Phillip A. Hawman and Hawman Farms, Inc. are partners doing business as Hermiston Potato, whose business address is Route 3, Box 1731, Hermiston, Oregon 97838.

2. Respondent G & T Terminal Packaging Co., Inc., is a corporation whose business mailing address is B266 NYC Terminal Market, Bronx, New York 10474. At the time of the transactions involved herein respondent was licensed under the Act, and subject to its provisions.

3. On or about August 3, 1984, in the course of interstate commerce, complainant, by oral contact, sold to respondent two carlots of U.S. No. 1 Non Size A potatoes at a quoted price of $15.00/cwt F.O.B. on a price protection on arrival basis.

4. On or bout August 6, 1984, in the course of interstate commerce, complainant, by oral contract sold to respondent three carlots of U.S. No. I Non Size A potatoes at a quoted price of $14.00/cwt F.O.B. on a price protection on arrival basis.

5. The transactions set forth in Findings of Fact 3 and 4 above were negotiated by Garnand Marketing, inc., (Garnand), on behalf of complainant, and by Trademark Produce & Sales (Trademark), on behalf of respondent.

6. During the period August 5 through 7, 1984, complainant shipped from loading point in Oregon to respondent in New York five carlots of potatoes for the purpose of fulfilling the terms of the contracts referenced in Findings of Fact 3 and 4 above.

7. All five carlots arrived at respondent's site during the period August 13 through 15, 1984.

8. There were condition problems with the five carlots of potatoes.

9. Respondent instructed Trademark to negotiate an allowance for the condition problems as well as for the market, which had declined since the dates on which the contracts were negotiated.

10. Three federal inspections for these shipments were completed on August 14, 1984, one federal inspection was completed on August 15, 1984, and the final federal inspection was completed on August 16, 1984.

11. Respondent accepted the five carlots of potatoes.

12. Garnand and Trademark negotiated a price reduction to $10.00/cwt, and Trademark issued a Confirmation of Sale identifying the carlots and stating that adjustments to $10.00/cwt were agreed to on August 14 and 15, 1984.

13. Respondent refused to pay complainant $10.00/cwt for these shipments, claiming that the adjustment to $10.00 was an allowance for market decline only, and not a condition allowance.

14. Less than one week earlier, respondent had purchased three carlots of potatoes from complainant. Garnand and Trademark had also negotiated these contracts on behalf of complainant and respondent, respectively. These carlots were also purchased on a price protection basis, and arrived with condition problems which were similar to the five carlots which are the subject of this complaint. Garnand and Trademark negotiated a reduction from the initially quoted prices for these three previous carlots, and respondent paid complainant on the basis of the reduction negotiated by Trademark.

15. Before hearing, respondent paid to complainant $34,520.30 as the undisputed amount owed on the five carlots which are the subject of this complaint.

16. The complaint in this proceeding was filed within nine months after the cause of action accrued.

Conclusions

The transactions in question were negotiated by Garnand on behalf of complainant, and by Trademark on behalf of respondent. Complainant initially believed that the August 3, 1984, sales were made at $15.00/cwt F.O.B. Hermiston, and that the August 6, 1984, sales were made at $14.00/cwt F.O.B. Hermiston, without any price protection. However, upon shipment or soon thereafter, complainant learned that its broker had agreed that the final price would be adjusted to take into account any decline in the market. Since complainant did nothing to object to the price protection agreed to by its broker, it is bound by this provision. The silence of a principal after learning that his agent has changed the terms of a contract will constitute a ratification by that principal. *Woodrow Johns Co. v. Moritz*, 19 A.D. 537 (1960).

Therefore, the salient issues concern whether respondent's broker negotiated a final price/cwt. for these potatoes and, if so whether respondent is bound by those terms. It is basically undisputed that at the time of arrival, the market had declined, although the extent of that decline is disputed. It is also evident that the condition of the potatoes upon arrival was not in accordance with the contract terms. The type of problems noted on the inspection certificates after arrival (sticky, sunken discolored areas and brown skin discoloration) support respondent's contention that the potatoes did not meet the standards for U.S. No. 1 potatoes at the time of shipment. *Guy Hawkins Company v. Jimmie Shmon*, 16 A.D. 1161 (1957). Therefore, it was respondent's option to either reject the potatoes on the basis of nonconformity with the contract terms, or accept the potatoes with an adjustment from the initially quoted prices of $15.00/cwt and $14.00/cwt for both the market decline and the condition problems.

It is uncontested that respondent accepted the potatoes. It is also clear that upon or soon after the inspection of four of the five loads in question, the brokers agreed to a price adjustment of $10.00/cwt. Respondent claims, however, that this adjustment took into account the market decline only, with a further reduction to be negotiated by the parties and their brokers for the condition problems. In the alternative, respondent contends that if its broker did agree to the $10.00/cwt price as the final price to be paid after

consideration of both market decline and condition problems, the was no authority for that action, and respondent is not bound by it

The record supports the conclusion that the brokers agreed to the $10.00/cwt price after consideration of both the market decline and the condition problems with the shipments in question. The report of investigation contains letters from both Garnand and Trademark stating that this reduction from the initially quoted prices of $15.00 and $14.00 took into account both factors. The letter from Garnand, by itself, would not be particularly persuasive because of its unsworn nature and because of the close relationship between Garnand and complainant. However, the business of Trademark is quite independent of complainant, and the Trademark letter states that the reductions "were in consideration of the market and because of quality problems." Respondent's President testified at hearing that the Trademark representative had recanted this statement, and had at first agreed to appear at hearing, but then changed his mind. However, it was incumbent upon respondent to subpoena this individual on such a critical issue. Without testimony from this individual to contradict the assertions in his letter, this letter becomes particularly persuasive on the issue of what the price production to $10.00/cwt represented.

There is additional evidence to support the written statements from both brokers. First, Trademark issued a formal confirmation of sale showing the prices on all five carlots adjusted to $10.00/cwt on 8/14/84 and 8/15/84. While respondent points out that the final car was not inspected until august 16, 1984, it had already been spotted by August 15. The issuance of a formal confirmation of sale showing price adjustments when federal inspections had been performed on four of the five cars and when the fifth car was about to be federally inspected and was available for an informal inspection by respondent[1] supports the brokers' statements that the adjustments were for both market decline and condition. Otherwise one would expect Trademark to wait the extra day and issue the confirmation when the adjustments were finalized.

Respondent's contention that neither it nor its broker would have agreed to a condition adjustment before the last of the five cars was inspected is insufficient to rebut the strong evidence to the contrary. As explained by complainant, three additional shipments not subject to this dispute were sold by complainant to respondent with the same price protection terms immediately before the five shipments in question. The inspections on those cars revealed the same condition problems as on the five which are the subject of this complaint. Hence, there was a clearly rational basis to assume that the condition of the last car, which was already spotted at the time the adjustment was negotiated, was similar to the seven carlots which had been received previously. Respondent's contention that there was no rational basis for such an action must be rejected.

---

[1]A letter from Union Pacific System states that this car was spotted at 10 p.m. on August 14 and respondent's records show this car at respondent's site on August 15.

Respondent's records also indicate that more than one adjustment made on the five shipments which are the subject of this complaint. Some of the "car folders" generated by respondent with respect to these transac show that the initially quoted prices were first adjusted down to $13.0(then to $10.00. While not conclusive, these notations provide further evid that both the market decline and the condition problems were consider adjusting the price from $15.00 and $14.00, first to$13.00, and then to $

Accordingly, the preponderance of the evidence shows that the br did, in fact, agree to the final $10.00/cwt price after taking into account the market decline and the condition problems. the next issue con whether Trademark had authority to bind the respondent to this agree The record also supports the conclusion that Trademark did have authority.

An agency may be either actual or apparent. "An actual agency m an express agency created by oral or written agreement, or an implied ag to be proved by deductions or inferences from facts and circumstar *Woodrow Johns Co. v. Sikeston Fruit & Produce*, 19 A.D. 547, 551 (1960 the *Woodrow Johns Co. v. Sikeston Fruit & Produce* case, the Judicial Oi held that the unsworn statement of the alleged agent, and the one pre transaction in which the alleged agent may have appeared to complaina be clothed with some authority to act on behalf of the respondent, insufficient to establish an agency in light of the direct oral testimony o respondent that no agency relationship existed. That case is very diff from the present case. In the present proceeding both respondent's (manager and president repeatedly acknowledged in their direct testimony Randy, the Trademark representative, was utilized as the go-betwe communicating their requests for price adjustments to complainant's agent.

Respondent's office manager testified that Mr. Anthony Spi respondent's president, would instruct her to contact the broker in ord negotiate allowances or adjustments. In response to questions respondent's counsel, the office manager testified as follows:

> Q: Could you tell us again what that means, to Randy 8/16?
> A: That I read this inspection to him on the phone.
>
> Q: There's another word there "allow". Is that your handwriting?
> A: Not, it isn't.
>
> Q: Do you know whose handwriting it is? If you know.
> A: Yes, Mr. Spinale's.
>
> * * *
>
> Q: Do you know what [allow] means?
> A: Yes. That means that -- he's telling me that this car is bad and I should tell the broker that we need an allowance.

On cross-examination, the office manager repeated this procedure:

> Q: What exactly is your job as far as dealing with the broker goes?
> A: Well, the broker calls and tells me he has potatoes and tells me what the market is. I, in turn, tell Mr. Spinale that Randy called and he's got potatoes he's offering at such a price, if you're interested. It's up to Mr. Spinale to tell me, okay, tell Randy to get me two cars, five cars, six cars, or whatever. Then, I call Randy back and tell him. I'm like the in between.
>
> Q: How about as far as allowances on any loads go? What is your job?
> A: I have no part of that. Mr. Spinale does that.
>
> Q: Does Mr. Spinale talk to Randy?
> A: No. But, he may tell me. In other words, he'll tell me he needs $3.00 on this car and I'll tell Randy, he needs $3.00. Randy goes, I guess, to the shipper and then gets back to us.

It is also clear from the testimony of this witness that in the transactions which are the subject of this dispute, respondent was aware and did not object to Randy negotiating the price adjustments.

> Q: In [Randy's] letter, he states that the price agreed upon was due to market and quality problems, both. The price we agreed upon, the $10.00, was due to both conditions; market decline and the condition of the potatoes on arrival.
> A: That's untrue.
>
> Q: Why do you think he said that then?
> A: I don't know. We agreed on the price of $10.00 when the cars arrived. We didn't talk about the problem.
>
> * * *
>
> Q: Did [Randy] ever contact you and say that he couldn't get the adjustment made or that he had made it? Was there any communication after that?
> A: There might have been a few phone calls, yes. He did say to me the price was $10.00. I said yes, $10.00 on arrival, but the cars are out of grade, you have to give it an adjustment.
>
> Q: What did he say to that?
> A: He said he would get back to me.

Q: Did he ever?
A: Yes. He said that was the price that he made. He made it, we didn't.

Mr. Spinale's testimony also makes it clear that while respondent may not have specifically authorized Randy to settle the transactions for $10.00/cwt on the basis of both the market decline and the condition problems, he utilized his broke to communicate price adjustments and allowance and at least clothed him with apparent authority to settle these transactions for the $10.00/cwt price:

> Q: * * *. Do you personally try to settle the price discount to the shipper?
> A: Anything that takes place in G and T that has a problem with it in regards to an allowance, would have to be ultimately decided by myself. Nobody else would have that responsibility or take that responsibility. I'm the best judge of what kind of adjustment is needed in regards to a car that has a problem.
>
> Q: Might I ask, or I will ask, why didn't you contact the owner of Hermiston Potato personally to try to resolve this?
> A: I want to tell you something. I've been in business now for 30 years and as everybody can well see here, I don't have the nicest disposition in the world. I would not be able to turn around and deal with farmers too well. I don't get along with people in general, so you can understand that by just watching me here today. <u>I wouldn't have too much success dealing with anybody direct. I even have problems with my own broker, so I don't think -- that's why I use a broker. I have enough problems running my factory without arguing wit a shipper in reference to an allowance that should be taken or not. That's what broker are for</u>. [Emphasis Added]
>
> * * *
>
> There is nothing done in reference to anything, in G and T, in reference to the purchasing, in the settlement of a car that might have a problem, that doesn't have my okay. Be it a purchase or be it a settlement. I will say that if there is a problem and it has to be a settlement on it, I might say to Macie, tell the guy I need $3.00. Again, as you can very well understand, I don't get along with too many people. She will tell whoever it might be that Tony says he needs $3.00. I'm sure she does that with other brokers. A lot of times I'll even turn around and at times make a notation on some of the documents if I have the time.
>
> If there's any dispute in reference to the $3.00, then we have to make an issue of it or whatever I think is fair. I would say that 100% of the time with reference to the purchasing or the

settlement of any problem cars, that I would be the one that makes the decisions.

Q: Do you authorize any of your other brokers that you're buying from, or shippers, I guess we'd have to say sales brokers, do you authorize any of them to make settlements?
A: Again -- you're asking me the same question. I'll answer it again for you.

Anything that has to be settled would have to be okayed by me. You say, do I authorize them -- if I say I need $10.00 a bag allowance and the broker turns around and says to me, okay, I got you the $10.00. Then I'll say okay, we'll take the $10.00.

He's not making the settlement on behalf of me without my knowledge and without my price. If I'm saying I need $4.00, he would have to take that price. He's not going to go to a shipper and say he needs $4.00, but I'm going to settle it for $2.00. He doesn't have that authorization. Nobody has.

Finally, respondent does not dispute that Randy settled the three shipments which arrived from complainant a few days before the five in question in the identical fashion. Respondent in no way objected to these settlements and paid in accordance with them. It is well established that an agency may be implied from previous similar dealings. *Woodrow Johns Co. v. Sikeston Fruit & Produce supra; Nash Decamp Co. v. Albertson Co*, 13 A.D. 283 (1954).

Complainant has carried its burden of proving that the parties, through their brokers agreed to a final settlement price of $10.00/cwt, and that Trademark had at least apparent authority to bind respondent to this settlement. Therefore, respondent owes the complainant the $33,220.30 which it deducted from the total amount due in these transactions. Respondent's failure to pay complainant this amount is a violation of section 2 of the Act for which reparation should be awarded.

Order

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, $33,220.30 with interest thereon at the rate of 13% per annum from 1984 until paid. Complainant's claim for expenses is not accompanied by an affidavits as required by the provisions of section 47.19 of the Rules of Practice and, therefore, is disallowed.

Copies of this order shall be served upon the parties.

PHILLIPS A. HAWMAN and HAWMAN FARMS, INC. v. G & T TERMINAL PACKAGING CO., INC.
PACA Docket No. 2-6898.
Order issued September 22, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

AMENDED ORDER

On September 11, 1987, a Decision and Order was issued awarding reparation with interest to complainant in the amount of $33,220.30. Though inadvertence the month from which such interest would begin to be computed was left out of the Order. Therefore, the Order is amended to read as follows:

Order

Within 30 days from the date of this Order, respondent shall pay to complainant, as reparation, $33,220.30 with interest thereon at the rate of 13% per annum from September 1, 1984, until paid. Complainant's claim for expenses is not accompanied by an affidavit as required by the provisions of section 47.19 of the Rules of Practice and, therefore, is disallowed.

Copies of this order shall be served upon the parties.

HENRY AVOCADO PACKING COMPANY v. MORENO PRODUCE COMPANY.
PACA Docket No. 2-6164.
Order issued September 24, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $6,960.00 in connection with a transaction involving the shipment of avocados in interstate commerce.

On August 1, 1983, this matter was stayed pending completion of respondent's bankruptcy.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

HILLMEX, INC. v. MIZAKAMI BROS. OF ARIZONA.
PACA Docket No. 2-7028
Decision and Order issued September 2, 1987.

Contracts--oral.

Under an oral contract obligating respondent to sell complainant's cantaloupes on a commission basis, respondent was not authorized to make changes for palletization or for icing. Reparation was awarded to complainant for the amounts which respondent deducted for these items in its accounting to complainant.

George S. Whitten, Presiding Officer.
James D. Hunter, for Complainant.
L Anthony Sedgeuick, for Respondent.
Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $57,788.10 in connection with the shipment in interstate commerce of numerous loads of cantaloupes.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant.

Although the amount claimed in the formal complaint exceeds $15,000.00, the parties waived oral hearing and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, respondent filed an answering statement, and complainant filed a statement in reply. Neither party filed a brief.

Findings of Fact

1. Complainant, Hillmex, Inc., is a corporation whose address is P. O. Box 187, Hilmar, California.
2. Respondent, Mizakami Bros. of Arizona, is a corporation whose address is P. O. Box 2047, Nogales, Arizona. At the time of the transactions involved herein, respondent was licensed under the Act.
3. On or about February 10, 1984, complainant and respondent entered into an oral contract, the terms of which were as follows:

    a. Respondent was to receive cantaloupes from complainant at respondent's produce shed in Nogales, Arizona.

    b. Respondent was to pay Mexican freight and ice charges.

    c. Respondent was to pay all necessary crossing fees, inspection fees and any other fees as necessary to cross cantaloupes into the United States.

    d. Respondent was to broker and sell the cantaloupes for the highest price obtainable.

e. Respondent was to receive 12½% commission on the selling price of the cantaloupes as a brokerage fee.

f. Respondent was to remit the balance of the selling price on the cantaloupes to complainant after deducting and being reimbursed for (b) and (c) above.

g. Respondent was to pay complainant eveiy ten days for cantaloupes received.

4. Beginning March 20, 1984, complainant shipped to respondent from loading point in Mexico numerous truckloads of cantaloupes. The total number of packages of cantaloupes received by respondent from complainant amounted to 67,986 cartons. Complainant terminated shipment to respondent on or about April 18, 1984, due to respondent's failure to pay complainant in accordance with the agreed payment schedule.

5. Respondent charged complainant a 75¢ per carton palletization fee in connection with each carton of cantaloupes received by respondent from complainant. The contract between complainant and respondent made no provision for such a charge of palletization to complainant. In addition, respondent charged an identical, duplicate 75¢ per carton palletization fee for each carton of cantaloupes to its customers.

6. An informal complaint was filed on October 17, 1984, which was within nine months after the causes of action heiein accrued.

Conclusions

Complainant brings this action to recover $50,989.50 in palletization fees, and $6,798.60 in icing fees deducted by respondent in its accounting to complainant for 67,986 containers of cantaloupes shipped by complainant from Mexico to respondent in Nogales, Arizona, between March 20 and April 18, 1984. Complainant submitted evidence showing that upon receipt of respondent's accounting, complainant requested that it be allowed to see respondent's invoices to its customers. Respondent supplied complainant with the requested invoices and complainant noted that lines were blanked out on each invoice and that the totals for each invoice were also blanked out. In addition, respondent had blanked out the names of the customers. Complainant then went back to respondent and demanded to see the original invoices. After protesting, respondent eventually gave complainant copies of the original invoices. These copies showed that complainant had blanked out the lines showing a 75¢ per package palletization charge of its customers. Prior to receiving any of the invoices from respondent, complainant had complained to respondent about deductions foi palletization and for icing charges on the accounting which respondent had rendered to complainant.

Respondent maintains that under the terms of the oral contract, complainant was to palletize the cantaloupes in Mexico prior to shipment. Respondent also maintains that complainant failed to so palletize the cantaloupes, was informed by respondent that since it had failed to palletize, respondent would do the palletizing and would charge complainant for such palletizing. Respondent contends that complainant agreed to accept such charges. We have found, as a matter of fact, that the contract did not contain

agreement on complainant's part to palletize the cantaloupes. We also do not believe that complainant ever agreed to accept a palletizing charge from respondent. In this connection, we note that respondent admits concealing the palletizing charge on the first set of invoices which it gave to complainant. Respondent's only explanation for this concealment is as follows:

> WITH THEIR PERMISSION WE DID COVER CUSTOMER NAMES, BECAUSE THAT IS PART OF A COMPANY'S TRADE SECRETS. SINCE WE WERE NOT CHARGING COMMISSION ON THE 75 CENTS PALLETIZING CHARGES WE ALSO COVERED THAT PORTION WHICH WE LATER SHOWED THE ORIGINAL WHICH DID NOT CHANGE ANYTHING. I DENY THAT WE ALTERED INVOICES. ALL WE DID WAS TO COVER THE ABOVE TWO ITEMS.

The fact that respondent was not charging a commission on the duplicate palletizing charges to its customers would hardly seem adequate reason for covering up these charges on the invoice. Why did respondent not simply write to complainant "You will notice that we charged you no commission on the palletization charges to our customers." As complainant points out, to go through each invoice and paste a narrow strip of paper over each line with a palletization charge, as well as over the total, involved an inordinate amount of work. We think that the only motive which could have prompted such effort was embarrassment over having charged both complainant and the customer for the same palletization. We find that respondent is liable to complainant for $50,989.50 in palletization charges. Respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

Complainant also claims that it is due $6,798.60 in connection with ice charges which were deducted by respondent when respondent accounted to complainant. Respondent replies that the terms of the oral contract as set forth by complainant provide for ice charges. However, such oral contract provides for respondent to pay "Mexican freight and ice charges" and be reimbursed for same. The ice charges which are in question here are not Mexican ice charges but rather charges for icing that respondent did in its own warehouse. Respondent admits this, and in addition, submitted invoices showing that such ice charges were incurred by it. Complainant maintains that such charges are unreasonable since respondent would be expected to have a cooling room at its establishment in Nogales, and THAT since the cantaloupes had already been iced in Mexico, further icing would not be necessary. Respondent does not contend that the ice was used due to insufficient icing in Mexico but rather states that "As for the ice--this is also a legitimate charge as this is the ice used to keep the produce fresh on our warehouse floor and not ice used to transport the produce to destination." We believe that the expected course of action under this contract was that respondent would store the produce in its warehouse in a refrigerated cooling room. If any additional icing charge was going to be necessary, this should

have been covered by, and made explicit in, the oral contract between the parties. We find that the complainant is entitled to reimbursement from respondent for the icing charges in the amount of $6,798.60. Respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

Order

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $57,788.10, with interest thereon at the rate of 13% per annum from April 1, 1984, until paid.

Copies of this order shall be served upon the parties.

HI-VALUE PROCESSORS, INC. v. LESTER ALTMAN PRODUCE CO., INC.
PACA Docket No. 2-7241.
Order issued September 1, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $2,666.02 in connection with a transaction involving the shipment of honeydew melons in interstate commerce.

By letter dated July 10, 1987, complainant notified the Department that settlement had been reached.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

HOMESTEAD TOMATO PACKING CO., INC. v. OLYMPIC WHOLESALE PRODUCE & FOODS, INC.
PACA Docket No. 2-7093.
Decision and order issued September 3, 1987.

Acceptance - Change in contract terms - Handling of consigned produce.

Respondent accepted the tomatoes upon delivery by unloading them. Respondent sustained its burden of proving a change in the contract terms from an f.o.b. sale to a consignment, as respondent's version of events is strongly supported by the broker. Respondent's handling of the tomatoes held to be proper, considering their excessive decay.

Andrew Y. Stanton, Presiding Officer.
Complainant, pro se.
Robert C. Meltzer, for Respondent.
Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $1,282.00 in connection with a sale of a load of tomatoes to respondent in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon the parties. A copy of the amended report of investigation was also served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability.

Since the amount claimed as damages does not exceed $15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered part of the evidence, as are the verified complaint and answer. The parties were given the opportunity to submit additional evidence in the form of verified statements and to file briefs, but elected not to do so.

Findings of Fact

1. Complainant, Homestead Tomato Packing Co., Inc., is a corporation whose address is P. O. Box 3064, Florida City, Florida.

2. Respondent, Olympic Wholesale Produce & Foods, Inc., is a corporation whose address is 31 South Water Market, Chicago, Illinois. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On approximately April 26, 1985, complainant sold to respondent a partial truckload of tomatoes consisting of 320 cartons of 6x6 Strano Pride U.S. combination at $4.50 per carton, 160 cartons of 5x6 U.S. number two at $5.00 per carton, 160 cartons of 5x6 U.S. number three at $3.50 per carton, 160 cartons of 6x6 U.S. number three at $2.50 per carton, and 160 cartons of 6x7 U.S. number three at $2.00 per carton, plus $.50 per carton for gas, $.05 per carton for freight to the gas house, $.15 per carton for pallets, and $22.50 for a Ryan recorder, for a total contract price of $4,214.50 f.o.b. The tomatoes had been federally inspected on April 18, 19 and 20, 1987, at shipping point, and found to contain no decay. The contract of sale was negotiated by a broker, Rising Star Brokerage, Inc., Chicago, Illinois, through its president, Michael Stone.

4. The broker issued a confirmation of sale, reflecting the agreed upon contract terms, except that the confirmation erroneously stated the price for the 6x6 Strano Pride U.S. combination as $4.00 per carton rather than the correct price of $4.50 per carton, stated the charge for a Ryan recorder as $11.25 instead of $22.50, and left out the charge for freight to the gas house of $.05 per carton. The confirmation also contained a charge for freight and brokerage of $1.20 per carton. The broker apparently paid the freight on behalf of respondent.

5. The tomatoes were shipped from complainant in interstate commerce to respondent, where they arrived the morning of April 30, 1985. Respondent

unloaded the tomatoes and, at 10:00 a.m., on April 30, 1985, had a portion of the load federally inspected. According to the inspection report, the inspection revealed as follows, in relevant part:

> Products Inspected: TOMATOES in cartons printed "Selected Tomatoes" and stamped "6x6" or "6x7" or "5x6",most cartons also stamped "Florida Federal State Inspected 903139" or printed "Strano's Pride" and stamped "6x6, Florida Federal State Inspected 903139" each also printed "Strano Farms, Homestead Tomato Packing Co., Inc., Florida City, Florida, net wt. 25 lbs." Inspector's count 304 cartons of Strano's lot and 336 cartons of Select lot.
>
> Condition of Load: Each lot: Stacked in applicant's cooler.
>
> Condition of Pack: Each lot: Fairly well filled.
>
> Condition: Strano's lot: Average approximately 15% green and breakers, 35% turning and pink and 55% light red to red. Decay in most samples from 2 to 22%, some none, average 6% Gray Mold Rot mostly advanced, some in early stages. Damage by sunken discolored areas average 2% including 1% serious damage.
>
> Select lot: Average approximately 5% green and breakers, 20% turning and pink, 65% light red to red. Decay from 6 to 18%, average 10% Gray Mold Rot in various stages, mostly advanced.

6. Upon receiving the inspection results, respondent informed the broker that it wanted to reject the load. The broker notified complainant. The broker's Mr. Stone spoke with Carole Sugerman, an employee of complainant, who authorized respondent to handle the tomatoes on consignment for complainant's account.

7. On April 30, 1985, the broker issued a corrected confirmation of sale, reading as follows, in relevant part: "Handle for the shipper. These tomatoes failed to grade because of decay. These tomatoes were oked [sic] by Carol and Tom at Homestead Tom. A sales accounting will be furnished." Copies of this corrected confirmation were sent to complainant and respondent, who received them without objection.

8. Respondent resold the tomatoes for complainant's account, obtaining gross proceeds of $4,428.50 in gross proceeds, from which respondent deducted a 15 percent commission of $664.00, and freight of $1,152.00, leaving $2,612.50. Respondent ha provided to complainant the account sales and a check for $2,612.50, which complainant has accepted as partial payment.

9. In a letter to the Department dated November 6, 1985, Michael Stone, president of the broker, stated as follows in relevant part:

> It was my understanding that the tomatoes were to be left at Olympic Wholesale Produce Co., and sold for Homestead Tomato Packing Co., Inc. as per Carole Sugerman at

Homestead Tomato Packing Co., Inc. Olympic Wholesale did everything Carole at Homestead Tomato Packing said to do. Olympic Wholesale was told to repack and keep sales accounting of the tomatoes they sold and dumped.

10. A formal complaint was filed on November 25, 1985, which was within nine months from when the alleged cause of action herein accrued.

Conclusions

Complainant contends that respondent deducted an excessive amount of money from the original invoice price. Complainant asserts that the 320 cartons of Strano Pride tomatoes were within grade upon delivery to respondent, and only 336 of the 640 cartons of U.S. number two and three tomatoes were federally inspected, so that the actual condition was much better than that revealed by the inspection. Complainant is willing to grant respondent $.50 per carton for each of the 640 cartons of U.S. number two and three tomatoes, reducing the price to $3,894.50. Therefore, claims complainant, as respondent has paid only %2,612.50, it still owes $1,282.00. Respondent denies liability, claiming it rejected the tomatoes and sold them for complainant's account, pursuant to complainant's authorization.

Contrary to respondent's contention, it did not legally reject the tomatoes, as the April 30, 1985, inspection report (Finding of Fact 5) shows clearly that the tomatoes were unloaded from the truck and stored in respondent's cooler when the inspection occurred. Further, respondent had disposed of 320 cartons at the time of the inspection. Therefore, at the time respondent attempted to reject the tomatoes, subsequent to the inspection, it had already exercised dominion over them, which constitutes acceptance. *Growers Exchange, Inc. v. Central Carolina Grocers, Inc.*, 42 Agric. Dec. 666 (1983). However, this does not necessarily mean that respondent is liable for the original invoice price, as respondent claims it was given authorization by complainant to handle the tomatoes for complainant's account. Respondent, as the party alleging a modification of the contract terms, has the burden of proving such modification by a preponderance of the evidence. *Howard Farms, Inc. v. Orval Kent Food Co., Inc.*, 41 Agric. Dec. 545 (1982).

Respondent's claim that the contract terms were changed to a consignment is strongly supported by the broker, as its president, Michael Stone, stated in a letter to the Department dated November 6, 1985, that Carole Sugerman, complainant's employee, authorized respondent to handle the tomatoes for complainant's account (Finding of Fact 9). This statement conforms to the corrected confirmation of sale issued on April 30, 1985, by the broker, which states that employees of complainant, one of whom was apparently Carole Sugerman, authorized respondent to handle the tomatoes for complainant's account, due to the decay revealed by the April 30, 1985, federal inspection (Finding of Fact 7). Complainant does not deny receiving this corrected confirmation, nor has it presented any statements from Carole Sugerman, its employee, denying that authorization was given to respondent to handle the tomatoes for complainant's account. Complainant's only argument, asserted in the complaint by its president, Rosario Strano, is

that respondent deducted an excessive amount, considering the findings of the federal inspection, which indicated that the Strano Pride lot was in grade. Complainant appears to concede that the other tomatoes were slightly out of grade. However, complainant is in error concerning the Strano Pride tomatoes, as the inspection report found an average of six percent Gray Mold Rot, mostly advanced, some in early stages, and two percent damage by sunken, discolored areas, including one percent serious damage. According to the Department's regulations, at 7 C.F.R. § 51.1861(b)(2), U.S. combination tomatoes, at destination, can have no more than five percent decay. While the inspection covered only 304 of the 320 cartons of Strano Pride tomatoes, the percentage of decay would be over five percent even if the missing 16 cartons had been in perfect condition. Further, although only 336 of the 640 cartons of grades two and three tomatoes in the load were inspected, the inspection results, an average of ten percent Gray Mold Rot in various stages, mostly advanced, would exceed the five percent maximum permitted by 7 C.F.R. § 51.1861(c)(2) and (d)(2), even if the absent 304 cartons had been free from decay. This evidence of the poor condition of the tomatoes upon arrival at respondent's place of business lends further support to respondent's claim that the parties agreed to change the contract terms to a consignment, as such an actin would be reasonable under these circumstances. In view of the evidence in the record, we conclude that respondent has sustained its burden of proving a change in the contract terms.

It remains to be determined whether respondent's return was reasonable. Respondent has presented evidence that it resold the tomatoes for $4,428.50. From this figure, it deducted a 15 percent commission of $664.00, plus $1,152.00 in freight and brokerage which it had paid to the broker, for a net return of $2,612.50. We believe that respondent's gross proceeds and deductions were reasonable, considering the condition of the tomatoes, as were respondent's deductions, and the net return was therefore proper. Accordingly, respondent is without any further liability to complainant, and the complaint must be dismissed.

Conclusions

The complainant is hereby dismissed.

Copies of this order shall be served upon the parties.

JOHNSTON-GIBSON SALES COMPANY v. PHILLIP R. WELLER d/b/a RICHARD WELLER and/or DICK WELLER ONTARIO, LTD.
PACA Docket No. 2-6362.
Order issued September 23, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant sought reparation against

respondents in the amount of $16,207.50 in connection with a transaction involving the shipment of produce in interstate commerce.

A copy of the formal complaint was served on respondents which filed answers denying any liability to complainant. The matter was heard, and on July 18, 1984, a Decision and Order was issued finding that respondents were liable to complainant in the amount of $15,082.50, plus interest. Subsequent to the preparation of this Decision and Order, the Department was notified that respondent Phillip R. Weller d/b/a Richard Weller had filed a petition in bankruptcy. Accordingly, also on July 18, 1984, this matter was stayed as against Mr. Weller pending completion of his bankruptcy proceeding.[1] Having heard nothing further, on July 27, 1987, the Presiding Officer suggested to complainant that it would be appropriate to dismiss the complaint because the matter was, undoubtedly, resolved by the Bankruptcy Court. The complainant was given an opportunity to object to this suggestion but did not do so.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

LET-US-PAK v. WESTERN BEST PACKING CO.
PACA Docket No. 2-6464.
Order issued September 24, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $5,626.64 in connection with a transaction involving the shipment of lettuce in interstate commerce.

On May 16, 1984, this matter was stayed pending completion of respondent's bankruptcy.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

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[1]The matter was not stayed against respondent Dick Weller Ontario, Ltd.

TONY D. LOVE and PATRICK H. ROSALES d/b/a L&R ORCHARDS v. IMPERIAL BRANDS, INC.
PACA Docket No. 2-6901.
Order issued September 4,1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER VACATING PRIOR ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a et seq.). On August 14, 1986, this proceeding was stayed because respondent had filed a voluntary bankruptcy petition in the United States Bankruptcy Court for the Middle District of Florida. The Department now has been advised that that petition was dismissed on April 30, 1987. Accordingly, the automatic stay provision of 11 U.S.C. § 362 no longer compels us to stay this proceeding, and the August 14, 1986, Order is vacated.

Copies hereof shall be served upon the parties.

J. D. (JOHNNY) LOWE, JR., CO., INC. v. FAVA & COMPANY, INC.
PACA Docket No. 2-6411.
Order issued September 23, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $23,364.40 in connection with a transaction involving the shipment of watermelons in interstate commerce.

On January 10, 1984, this matter was stayed pending completion c respondent's bankruptcy.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

V. BARRY MATHIS, d/b/a BARRY MATHIS FARMS v. KENNETH ROS] CO., INC.
PACA Docket No. 2-7163.
Decision and order issued September 2, 1987.

Burden of Proof, Complainant - Acceptance - Rejection, by buyer -Burden of Proof, Responden - Breach of contract - Warranty of suitable shipping condition - Damages - Evidence c dumping - Contract modification, proof of - Inspection fees, liability for cost of - Clarificatio or policy regarding measure of damages.

Respondent is liable for the contract price of dumped load less any proven damages, wher respondent fails to proffer evidence of dumping as set forth in the regulations. Wher respondent fails to show that complainant agreed to modify the price term of the contrac

spondent is liable for the original contract price term. Rejection by respondent's buyer does not relieve respondent of liability under the contract.

Darlene W. Lassiter, Presiding Officer.
Complainant, pro se.
Donald E. Clark, for Respondent.
Decision and order filed September 2, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). The complainant timely filed a formal complaint in which complainant sought an award of reparation against respondent in the amount of $10,503.87 in connection with five shipments of potatoes in contemplation of interstate commerce.

Copies of the Report of Investigation made by the Department were served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto denying liability.

Because the amount claimed as damages was less than $15,000, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable. Under this procedure, the verified pleadings of the parties are considered part of the evidence in the case, as is the Department's Report of Investigation. In addition, the parties had the opportunity to file evidence in the form of verified statements. Neither party did so. Although both parties were given the opportunity to file a brief, neither party did so.

Findings of Fact

1. Complainant, V. Barry Mathis, doing business as Barry Mathis Farms, hereinafter referred to as Mathis, is an individual whose business mailing address is P.O. Box 641, Hastings, Florida 32045. At the time of the transaction involved herein, Mathis was not licensed under the Act, but operated subject to the Act,

2. Respondent, Kenneth Rose Co., Inc., hereinafter referred to as Rose, is a corporation whose business mailing address is P.O. Box 729, East Palatka, Florida 32031. At the time of the transaction involved herein, Rose was licensed under the Act.

3. Between June 3, 1985, and June 9, 1985, Mathis sold and shipped five truckloads of potatoes to Rose, at a f.o.b. price of $5.00 per hundredweight, pursuant to an oral contract and in contemplation of interstate commerce.

4. Mathis issued an invoice for each truckload which stated in pertinent part as follows:

Date 1985	Invoice No.	Potato Weight	Purchase Price
6/3	275	#42050	$2,102.50
6/4	282	#51880	2,594.00
6/4	284	#44540	2,227.70
6/4	285	#47060	2,353.00
6/9	297	#48380	2,419.00

5. On June 3 and 4, 1985, Rose sold and shipped the first two truckloads of potatoes, #275 and #282, to The Crosset Co., Inc., Cincinnati, Ohio, hereinafter referred to as Crosset.

6. Crosset obtained a federal inspection on June 5, 1985, at 8:10 a.m., for truckload #275, which stated that the condition of the potatoes, in pertinent part, was as follows:

Condition of Equipment: Temperature control unit not running. Rear doors open.
Products Inspected: Round White Potatoes in bulk with no distinguishing marks.
Condition of Load: Through load, 1 to 5 feet deep. CONDITION DETERMINATION BASES [ON] WASHED SAMPLES.
Temperature of Product: Rear doors: Top 61° F; Bottom 61° F; 10 ft from rear doors, 1 foot deep: 81°
Condition: Mostly firm. Average 2% damage by Fusarium Tuber Rot (dry type). In most samples 3 to 58%, in many none, average 18% soft rot, Slimy Rot, generally advanced stages.

7. Crosset obtained a federal inspection on June 6, 1985, at 9:00 a.m., for truckload #282, which stated that the condition of the potatoes, in pertinent part, was as follows:

Condition of Equipment: Temperature control unit running. Rear doors open.
Product Inspected: Round White Potatoes in bulk with no distinguishing marks.
Condition of Load: Through load, 3 to 5½ feet deep.
Temperature of Product: Rear Doors: Top 54° F; Bottom: 68° F; ½ length, 1 foot deep: 80° F
Condition: Mostly firm. From 3 to 38%, average 16% soft rot, Slimy soft rot, generally advanced stages.

8. Crosset timely rejected the truckloads #275 and #282 and gave timely notice of its rejection to Rose.

9. On June 4, 1985, Rose sold and shipped two truckloads of potatoes, #284 and #285, to Hoff & Company, Inc., Wellington, Ohio, hereinafter referred to as Hoff.

10. Hoff did not obtain an inspection of the potatoes in accordance with sections 46.39 and 46.40 of the regulations. (7 C.F.R. §§ 46.39, 46.40).

11. On June 9, 1985, Rose shipped a truckload of potatoes, invoice #297, to Super Spuds, Inc., Jacksonville, Florida, hereinafter referred to as Super Spuds.

12. Super Spuds did not obtain an inspection of the #297 shipment in accordance with sections 46.39 and 46.40 of the regulations. (7 C.F.R. §§ 46.39, 46.40).

13. Rose remitted to Mathis $1,191.67 for the five truckloads of potatoes calculated as follows:

#275	Invoice Price:	$2,102.50
	Loss Due to Dumping:	(2,102.50)
	Less Freight:	1,371.50)
	Less Inspection Fee:	(35.00)
		$ (1,406.50)
#282	Invoice Price:	$2,594.00
	Loss Due to Dumping:	(2,594.00)
	Less Freight:	(1,681.40)
	Less Inspection Fee:	(35.00)
		(1,716.40)
#284	Invoice Price:	$2,227.00
	Less Adjustment:	(1,762.45)
		464.25
#285	Invoice Price:	$2,353.00
	Less Adjustment:	(705.90)
		1,647.10
#297	Invoice Price:	$2,419.00
	Less Precooling:	(215.78)
		2,203.22
		$1,191.67

14. Mathis filed a formal complaint on February 25, 1986, which was within nine months after the cause of action accrued.

Conclusions

This proceeding involves the sale of five truckloads of potatoes to Rose by Mathis. Rose admits to the purchase of five truckloads of potatoes from Mathis at a f.o.b. price of $5.00 per hundredweight, or $11,695.50, pursuant to an oral contract. Rose remitted $1,191.67 to Mathis, which it claims is the amount due. Mathis seeks the balance of the contract price, $10,503.87, as a reparation award. We must consider each truckload in order to determine (1) whether Rose accepted the potatoes, and(2) whether there are any damages due to a breach of contract, which would reduce Rose's liability for the contact price.

Mathis has the burden to prove by a preponderance of the evidence that Rose accepted the five truckloads of potatoes. *New York v. Sandler*, 32 Agric. Dc. 702 (1973). Mathis sustained its burden for each truckload, First, Mathis alleges that on June 4, 1985, Rose called to convey the notice of Crosset's rejection of truckloads #275 and #282, but nevertheless, accepted the potatoes. Rose claims that during the conversation it also rejected truckloads #275 and #282, and entered into another contract to sell the potatoes to another buyer. Notice of rejection must be in clear, unmistakable terms. *Mario Saikhon v. Russell-Ward Co., Inc.*, 34 Agric. Dec. 1940 (1975). Also, a notice of rejection from Rose's buyer, Crosset, is not sufficient to show a rejection by Rose in order to relieve Rose of liability. *Womack Bros. Produce v. P.L. Echols*, 20 Agric. Dec. 895 (1961). The pleadings submitted by the parties and the Department's record of investigation show that Rose sold truckloads #275 and #282 to Crosset. Crosset obtained a federal inspection, subsequently rejected both truckloads and gave timely notice of its rejection to Rose. Rose then informed Mathis of Crosset's rejection and told Mathis that it had another buyer to whom it could sell the loads. In light of these facts, we find that Rose did not give its own notice of rejection to Mathis in clear, unmistakable terms, but merely passed on the notice of Crosset's rejection, and Crosset's timely rejection is not attributable to Rose. Accordingly, we find that Rose accepted truckloads #275 and #282, and therefore is liable for the contract price of each load less damages which Rose can prove are due to a breach of contract by Mathis.

Second, Mathis alleges that Rose accepted truckloads #284, #285 and #297. Rose does not deny that it accepted these loads. Accordingly, we find that Rose accepted truckloads #284, #285 and #297, and therefore is liable for the contract price of each load less damages or price adjustments agreed to by Mathis which Rose can prove.

Rose must prove a breach of contract and damages for each truckload of potatoes or a modification of the contract price terms to which Mathis agreed in order to prove that its liability is limited to the $1,191.67 already remitted to Mathis. *Central & South America Imports Co. v. West Indies Food & Importing, Inc.*, 34 Agric. Dec. 1015 (1975).

First, Rose must prove that it suffered damages on truckloads #275 and #282 due to a breach of contract by Mathis. *Central & South America Imports, Inc., supra.* Rose met its burden to prove that Mathis breached the contract. Rose alleges that the extensive percentage of decay found in truckloads #275 and #282 constitutes a breach of contract. In a fob sale such as this one, to which the warranty of suitable shipping condition applies, Rose assumes all risk of loss due to improper transportation service and conditions. Mathis, as the shipper, is liable for any abnormal deterioration at the contract destination point if the potatoes do not make good delivery and their deterioration can be attributed to poor condition prior to shipment, either implicitly or explicitly. *Wolf v. Mendelson-Zeller Co.*, 34 Agric. Dec. 690 (1975); 7 C.F.R. § § 46.43, 46.44. Mathis did not raise the issue of abnormal in-transit conditions. Additionally, the file does not contain any evidence to indicate abnormal transportation. Therefore, we find that in-transit conditions were normal.

The federal inspection reports show that the potatoes in truckloads #275 and #282 did not make good delivery. Rose proffers the federal inspection

ults for truckloads #275 and #282, which report an average 2% damage e to Fusarium Tuber Rot (dry type) with an average 18% bacterial soft rot, my Soft Rot, generally advanced stages, and an average 16% bacterial soft , Slimy Soft Rot, generally advanced stages, in the respective truckloads. ese potatoes failed to meet all grade tolerances for potatoes prescribed in : regulations. (7 C.F.R. § 51.1540 *et seq.*) Thus, we find that the two ckloads were abnormally deteriorated and did not make good delivery. this breached the warranty of suitable shipping condition and thereby ached the contract. See, Market Diseases of Potatoes, Agriculture ndbook No. 479, United States Department of Agriculture, 1978.

Next, Rose must show that the potatoes in truckloads #275 and #282 re unmerchantable in order to prove that its damages are equal to the ntract price. Rose did not meet this burden. Rose states that it dumped : two truckloads. However, Rose proffered no evidence to prove that the tatoes were unmerchantable in order to justify dumping the loads. Section 23 of the regulations sets forth the evidence which Rose should have ffered to justify dumping more than five (5) percent of each truckload. (7 ⁷.R. § 46.23). Without evidence to show unmerchantability, we cannot find ustification for such drastic measures. *Floyd Harkness Co., Inc., a/t/a ited Packing Co. v. Randles Produce*, 33 Agric. Dec. 363 (1974).

The inspection report proffered by Rose is worthy of consideration in the culation of damages. Section 2-714(2) of the Uniform Commercial Code vides that the proper measure of damages for breach of a contractual rranty, as here, is the difference at the time and place of acceptance ween the value of the goods accepted and the value the goods would have l if they had been as warranted. The potato values here may be ermined by the actual percentage of condition defects at destination as own by the federal inspection report and the permissible percentage of ndition defects for the contract grade requirement as set forth in the ulations. Mathis and Rose failed to include a grade term in the contract. nce, we must apply the minimum grade standard for potatoes, U.S. mmercial. 7 C.F.R. § 51.1546(a)(3).

The inspection report shows the total percentage of condition defects ind in truckload #275 to be 18% soft rot with 2% Fusarium Tuber Rot l truckload #282 to be 16% soft rot. The regulations for U.S. Commercial tatoes allow 20% condition defects, provided that not more than 1% of the ndition defects is attributable to soft rot and 6% is attributable to internal 'ects such as Fusarium Tuber Rot. However, a shipment cannot be said to abnormally deteriorated if 2% soft rot is found at the destination point. cordingly, the appropriate measure of damage is 16% for truckload #275, % soft rot less a 2% allowance, and 14% for truckload #282, 16% soft rot s a 2% allowance. See, *J.H. Norman & Sons Distributing Co. v. Piggly Wiggly vion, Inc.*, 34 Agric. Dec. 1219 (1975).

Freight charges attributable to the decayed portion of each load are luctible from the contract price. *John C. Taylor Co., Inc. v. William J. nlon Co.*, 30 Agric. Dec. 398 (1971). In addition, Rose incorrectly charged this for inspection costs. The cost of a federal inspection is paid by the juesting party, Crosset here. *Freshpict Foods, Inc. v. Empire Foods, Inc.*, 32

Agric. Dec. 1968 (1973). Therefore, we find that Rose is liable for $3,542 of the contract price for truckloads #275 and #282, calculated as follows

#275	Contract Price	$2,102.50
	Less 16% Measure of Damages	(336.40)
	Less 16% of Freight Charges	(219.44)
	Amount Due	$1,546.66
#282	Contract Price	2,594.00
	Less 14% Measure of Damages	(363.16)
	Less 14% of Freight Charges	(235.40)
	Amount Due	1,995.44
		$3,542.10

The United States Court of Appeals for the Second Circuit favora discussed the percentage of condition defects method for the determinat of damages in its appellate review of a PACA reparation decision invol similar facts and issues of the proof and measure of damages as we have h In *G & T Terminal Packaging Co., Inc. v. Joe Phillips, Inc.*, Docket Nos. 7845, -7847, 4965 (2 Cir. 1986) The Second Circuit suggested that applica of this method is appropriate for cases such as the instant case.

Prior reparation decisions do not fully articulate when the percentage condition defects will apply to determine damages under the Act. Therefo we are taking this opportunity to set forth when this method will be used. cases which involve a high percentage of condition defects, the prefer methods to determine damages include, but are not limited to:

1. An account of sale proffered by the party seeking a damage award;

2. Evidence of dumping as prescribed in the regulations; and

3. Evidence of the average unit price obtained by resale.

At the discretion of the presiding officer, where the preferred meth are not applicable and the facts of the case satisfy the conditions set f below, the measure of damages analysis as applied here to truckloads # and #282 is appropriate.

1. The transaction must involve a F.O.B. sale to which the warrant suitable shipping condition applies;

2. The receiver must obtain an inspection report, as defined in secti 46.39 and 46.40 of the regulations (7 C.F.R. § § 46.39, 46.40), withi reasonable period of time after arrival of the goods at the contract destina point.

3. The inspection report proffered must show a percentage of condi defects which substantially exceeds the range of tolerance, as prescribed in appropriate regulation (7 C.F.R. Part 51), for good delivery; and

4. The party who seeks damages must proffer evidence to sho justification for failure to mitigate damages.

Rose has the burden to prove that Mathis agreed to modify the contract for truckloads #284 and #285. *F.H. Hogue Produce Co. v. M. Singer's Sons Corp.*, 33 Agric. Dec. 451 (1974). Rose failed to satisfy its burden. Rose alleges that Mathis agreed to place the two loads under consignment with Hoff and to adjust the price per hundredweight term of the contract. Mathis expressly denies that it agreed to place the loads on consignment or to a price adjustment. Rose proffers a bill of lading for each truckload to show that it consigned the potatoes to Hoff and several invoices from Hoff which show the price adjustment. However, none of the evidence proffered shows whether Mathis agreed to the changes. Therefore, we find that Rose did not prove that Mathis agreed to the consignment and price adjustment contact modifications. Accordingly, Rose is liable for the full contract price of each load, $2,227.00 and $2,353.00 respectively.

Rose must prove that Mathis agreed to deduct the cost of precooling truckload #297 from the price per hundredweight term in the contract. *F.H. Hogue Produce Co., supra*. Rose did not sustain its burden. Rose subtracted $.40 from the $5.00 price per hundredweight in its calculation of the amount due to Mathis for truckload #297. Rose alleges that Mathis agreed to the adjustment. Mathis expressly denies that it agreed to a precooling adjustment. Rose proffered no evidence to prove the agreement. Therefore, we find that Rose is liable for the full contact price of truckload #297, $2,419.00.

Rose is liable for the price of the five truckloads of potatoes as set forth below.

#275	$1,546.66	
#282	1,995.44	
#284	2,227.00	
#285	2,353.00	
#297	2,419.00	
	$10,541.10	Amount Due

Rose's previous remittance must be adjusted to reflect the inspection fees for truckloads #275 and #282 wrongfully charged to Mathis. Rose remitted $1,191.67 to Mathis for the five truckloads of potatoes. Rose improperly charged Mathis $70.00 for the cost of two federal inspections requested by Crosset for truckloads #275 and #282. *Freshpict Foods, Inc., supra.* Accordingly, Rose's liability under the contract, $10,541.10, is reduced by $1,121.67 remitted previously, leaving $9,419.43 unpaid. Rose's failure to pay this amount is a violation of section 2 of the Act for which reparation must be awarded.

Order

Within 30 days from the date of this Order, respondent Kenneth Rose Co., Inc., shall pay V. Barry Mathis, doing business as Barry Mathis Farms, as reparation, $9,419.43, with interest thereon at the rate of 13% per annum from July 1, 1985, until paid.

Copies of this Order shall be served upon the parties.

MAZZIE FARM SALES, INC. v. HARBOR BANANA DISTRIBUTORS, INC. a/t/a WHOLESALE FRESH FOODS.
PACA Docket No. 2-5880.
Order issued September 1, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $3,200.00 in connection with a transaction involving the shipment of potatoes in interstate commerce.

On February 22, 1982, this matter was stayed pending completion of respondent's bankruptcy.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

M-C INTERNATIONAL v. PURE GOLD, INC.
PACA Docket No. 2-7213.
Decision and order issued September 22, 1987.

Burden of proof - Standard pack of oranges - Weight of cartons.

Where complainant failed to prove that respondent had breached their contract by shipping oranges which were too small or cartons which weighed too little, the complaint is dismissed.

Edward M. Silverstein, Presiding Officer.
Complainant, pro se.
Thomas R. Oliveri, for Respondent.
Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation, in the amount of $26,968.41, against respondent in connection with one transaction, in interstate and foreign commerce, involving four lots of oranges, a perishable agricultural commodity.

Each party was served with a copy of the Department's report of investigation. In addition, respondent was served with a copy of the formal complaint, and filed an answer thereto denying any liability to complainant.

Although the amount involved exceeded $15,000.00, the parties waived oral hearing. Therefore, this matter was heard pursuant to the shortened procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20). Under this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. Also, the parties are given the opportunity to submit further evidence by way of verified statements. Complainant filed an opening

tatement, respondent filed an answering statement, and complainant also iled a statement in reply. Respondent fled a brief.

Findings of Fact

1. Complainant, M-C International, is a corporation whose mailing address is 742 Market Street, Suite 402, San Francisco, California 94102.

2. Respondent, Pure Gold, Inc., is a corporation whose mailing address s P.O. Box 40, Redlands, California 92373. At all material times, respondent was licensed under the Act.

3. On or about November 6, 1984, respondent, by oral contract, sold four ots of oranges to complainant as follows: 1,900 cartons of size 113 oranges at $9.45 per carton ($17,995.00), 1,748 cartons of size 138 oranges at $8.45 per carton ($14,770.60), and 152 cartons of size 163 oranges at $6.45 per carton $980.40), plus four temperature recorders at $30.00 each ($120.00), for a total agreed f.o.b. price of $33,826.00. It was understood by the parties that the oranges were to be delivered to Hong Kong. The term of sale was f.o.b. dockside Los Angeles.

4. Each of the four lots of oranges was the subject of a shipping point inspection on either November 6 or 9, 1984. On the inspection certificates ssued thereafter (D 019064, D 019065, D 019085, and D 019086), the grade of the oranges was noted as being "U.S. No. 1, Std. Pack." It also was noted hat the oranges met the "U.S. Standard for Export."

5. Thereafter, the four lots of oranges were delivered to complainant at he Port of Los Angeles, and shipped to Hong Kong in containers numbered, SCXU-4887048, SCXU-4884692, KKLU-504285, and KKLU-504436.

6. Container number SCXU-4884692 arrived in Hong Kong on November 25, 1984. A survey (inspection) of these oranges was conducted on November 28, 1984, by the Marine Survey & Consultancy Division of McLaren, Dick & Co (Asia) Ltd. ("McLaren, Dick & Co"). As the surveyor did not comment on the condition of the oranges, it appears that the survey was limited to size and weight. It was noted that "[f]rom [the surveyor's] visual inspection ... the size of the oranges was smaller than other brands." Also, the surveyor noted that the distance from the top layer of oranges to the top of the cartons was 1 inch for the size 138 and 1½ inch for the size 163. The average weight of a carton of the size 138 oranges was 40 pounds and 41 pounds for the size 163 oranges.

7. Container number SCXU-4887048 arrived in Hong Kong on November 25, 1984. A survey of these oranges was conducted on November 29, 1984, by McLaren, Dick & Co. The condition of the oranges was reported as "sound," but the surveyor noted that "the oranges were smaller in size than other brands of [the] same size count." It further was noted that the "distance from [the] top layer of oranges to [the] top of [the carton [was] about 3/4" to 1 inch." The weight was noted as being 40 pound

8. Container numbers KKLU-504285 and KKLU-504286 arrived in Ho Kong on December 1, 1984, and were opened and surveyed by McLaren, Di & Co on December 8, 1984. The surveyor noted that the "oranges wer smaller in size than other brands of [the] same size count," and that the distance from the top layer of oranges to the top of the carton ranged from

3/4 inch to 1 inch. The diameter and weight of the oranges was noted as follows:

Size	Diameter as Marked on Carton	Actual Diameter	Carton Weight
138	2.42 inches (61.47 mm)	59.0 mm	41.0 pounds
163	2.29 inches (58.17 mm)	57.0 mm	39.5 pounds
113	2.60 inches (66.00 mm)	65.5 mm	42.0 pounds

9. An informal complaint was filed on April 3, 1985, which was within nine months after the cause of action herein accrued.

Conclusions

"efore discussing the merits of this case, we must note an important on from the record, *viz*, neither patty mentioned whether or not the nant had paid the respondent for the subject oranges. In reviewing nt record and in preparing this Decision and Order, we assumed that yment had been made. Our assumption is based on respondent's to counterclaim for the invoice price. Had such payment not been respondent should have filed such a counterclaim. In any event, we dismiss the complaint, whether such payment was made is nt to our decision.

omplainant in reparation proceedings has the burden of proving each affirmative allegations by a preponderance of the evidence. *R.L. Peed G*, 32 Agric. Dec. 285 (1973). Thus, in the instant case, complainant d have to have shown that respondent breached their contract by shipping s which did not conform to the parties' agreement, and also would have shown that it suffered damages resulting from that breach. However, nant has failed to do so.

s complaint, the complainant seeks damages from the respondent it allegedly did not get what it claims it expected with regard to the he oranges and the weight of the cartons of oranges which respondent to it. With regard to the weight of the cartons, it appears that nant was expecting the respondent to give it a "heavy pack," meaning filled slightly over the top. Thus, although a carton of size 163 should be filled up by the time 163 oranges are placed in it, the nant would have expected the respondent to pack in still more. The anges, obviously, would raise the average weight of the carton. r, there is no evidence that would lead us to conclude that the parties discussed overfilling the cartons during their negotiations, and there o evidence that the parties' contract called for the respondent to pack ges in the manner described by complainant.[1]

plainant appears to have presumed, during its negotiations with respondent, that the v that it was the custom for cartons of oranges sold in Hong Kong to be overfilled. nt had the burden of proving by a preponderance of the evidence that respondent

Inasmuch as there is no evidence supporting the complainant's allegation that the parties' contract called for the cartons of oranges to be overfilled, we must conclude that the parties agreed to a standard pack of the oranges. The shipping point inspections of the four lots of oranges support the conclusion that the oranges were standard packed. Moreover, the weights of the cartons support such a conclusion. The weight range of the cartons of oranges shipped by respondent was 39.5 pounds to 42 pounds at the time they were inspected in Hong Kong. This compares favorably, even without considering the normal shrink which would have occurred during the time when the oranges were in transit from California to Hong Kong, with the weight range of cartons of oranges reported by other members of the industry. For example, the United Fruit and vegetable Association reported, in a document entitled "Container Net Weight," Alexandria, Virginia (Revised Edition August 1979),[2] that the weight range of cartons of oranges was 37 to 40 pounds. Also, the Department of Agriculture reported the weight of a 7/10 bushel carton of oranges as being 38 pounds. *Statistical Bulletin No. 616*, "Conversion Factors and Weights and Measure," USDA Economics, Statistics and Cooperative Service (March 1979), page 62.[3] We must conclude, therefore, that the respondent did not violate the parties' agreement with regard to the weight of the cartons of oranges.

As noted above, complainant also alleges that respondent violated their agreement by shipping oranges which were smaller in size than called for by their contract. In the four shipping point inspections, each lot of oranges was described as being "U.S. No. 1, Std. Pack." The requirement for satisfaction with this term is set out in 7 U.S.C. § 51.1094. In pertinent part, that section refers to the size of oranges as follows: "*** when oranges are packed for 113 carton count or smaller size, or equivalent sizes when packed in other containers, not more than 10 percent, by count, of the oranges in any container may vary more than five-sixteenths inch in diameter." Had the oranges not met this requirement, the inspector would not have noted that they met the requirements for "standard pack." Inasmuch as the inspectors did so, we have no choice but to conclude that the oranges were properly sized. In doing so, we recognize that the surveyors in Hong Kong indicated that the oranges were "smaller in size than other brands of [the] same size count." However, we also recognize that this size difference could have occurred because the subject orange were at the lower portion of the regulation's size tolerance while the oranges referred to by the surveyor were at the higher end.

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had this knowledge, but the record does not support a conclusion that respondent knew this. In such circumstances, as this was apparently the first time in which the parties dealt with one another (at least on transactions involving sales of oranges for export to Hong Kong), it wa incumbent upon complainant to have specified all of the terms of contract which it desire during the parties' negotiations. It should not have relied upon the presumption th respondent knew the trade customs of Hong Kong, but it apparently did.

[2]We take official notice of this document.

[3]We also take official notice of this document.

On the basis of their record before us, we must conclude that complainant has failed to prove that respondent violated the Act in any way. Consequently, the complaint ought to dismissed.

Order

The complaint is dismissed.

Copies of this order shall be served upon the parties.

MENDELSON-ZELLER CO., INC. v. JAMES FERRERA & SONS INC.
PACA Docket No. 2-7119.
Decision and order issued September 4, 1987.

Rejection attempt ineffective - Acceptance by exercise of dominion - Modification of contract terms--not proven - Burden of proving breach of warranty and damages - Limited inspection - Abnormal transportation conditions.

Respondent's attempted rejection of some of the strawberries in the load was ineffective and respondent held to have accepted the entire load, as respondent exercised dominion over the load by unloading and admittedly accepting a large portion of it. Respondent failed to sustain its burden of proving a modification of the contract terms allegedly providing for a price reduction. Respondent also failed to sustain its burden of proving a breach of the warranty of suitable shipping condition by complainant because of the limited inspection covering only a portion of the load, the absence of a high percentage of serious damage, and the presence of abnormal transportation conditions. Respondent held liable for the unpaid portion of the contract price.

Andrew Y Stanton, Presiding Officer.
Complainant, pro se.
Michael W. Pessia, for Respondent.
Decision issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $11,541.10, in connection with the sale of a truckload of strawberries to respondent, in interstate commerce

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability.

Since the amount claimed as damages does not exceed $15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered part of the evidence, as are the verified complaint and answer. The parties were given the opportunity to submit additional evidence in the form of verified statements and to file briefs, but declined to do so.

Findings of Fact

1. Complainant, Mendelson-Zeller Co., Inc., is a corporation whose address is 450 Sansome Street, San Francisco, California.

2. Respondent, James Ferrera & Sons, Inc., is a corporation whose address is 135 Will Drive, Canton, Massachusetts. At the time of the transaction alleged in the complaint, respondent was licensed under the Act.

3. On April 9, 1985, complainant sold to respondent 2,496 trays of no grade strawberries at $7.10 per tray, plus $.65 per tray for cooling, $487.50 for tectrol, and $22.50 for a Ryan recorder, for a total contract price of $19,854.00. The contract was negotiated by complainant and a broker, Ed Given, Inc., Salinas, California, represented by its president, Edmond M. Given. The parties agreed that the strawberries would be delivered on April 15, 1985.

4. The strawberries were loaded at 10:25 p.m. on April 9, 1985. According to the bill of lading, the pulp temperature of the strawberries when loaded was 35 degrees F., and a temperature range of 34 degrees F., through 36 degrees F., was to be maintained. The strawberries were shipped in interstate commerce to respondent, where they arrived on April 15, 1985. The Ryan recorder tape shows that the temperature inside the truck exceeded 36 degrees F., for a seven hour period when it rose to 45 degrees F., another six hour period when it climbed to over 40 degrees F., and a four hour period at the end of the trip, when it gradually rose to 45 degrees F. When the truck arrived at respondent's warehouse, it was partially unloaded, and respondent selected the best strawberries for sale to its customers. During this period, the truck doors were open for at least four hours.

5. On April 16, 1985, respondent had the remaining 1,440 trays of strawberries federally inspected, which found as follows, in relevant part:

> PARTLY UNLOADED
>
> TEMPERATURES 43° TOP 44° BOTTOM
>
> ...
>
> APPLICANT STATES 1440 lugs
>
> PRODUCT: STRAWBERRIES in plastic cups in fiberboard lugs printed "Crimson King, Mendelson-Zeller Co., San Francisco, Ca. 12 dry prints."
>
> SIZE: Generally 1 to 2½ inches in diameter.
>
> QUALITY AND CONDITION: Grade defects average 4%, undercolored and poorly developed. Damage by dry soft mushy areas ranges 7 to 48%, average 24%. Average 7% damage by dry, sunken areas. Average 2% decay.
>
> GRADE: Meets quality requirements but fails to grade U.S. No. 1 only account condition.

REMARKS: Restricted to product in 8 pallets nearest rear doors.

6. Respondent informed the broker it was rejecting 1,662 flats, and the broker notified complainant. Respondent then sold the 1,662 flats to Peter Condakes Company, Inc., Everett, Massachusetts, for handling on consignment. Peter Condakes Company, Inc., received $7,610.00, from which it deducted 15 percent commission of $1,141.50, for a net remittance of $6,468.50. This information is contained in a statement from Peter Condakes Company, Inc., dated May 22, 1985, on which is noted the following: "Sold for account of Ferrera Fruit & Produce-consigned."

7. Respondent has remitted $5,838.00, which complainant has accepted as partial payment of the amount allegedly due.

8. A formal complaint was filed on July 22, 1985, which was within nine months from when the cause of action alleged herein accrued.

Conclusions

Respondent admits accepting 834 of the 2,496 trays of strawberries contained in the truck that shipped them from complainant. Respondent claims that it properly rejected the remaining 1,662 trays because of their poor condition. Respondent has paid complainant $7.00 per tray for the 834 trays it admits were accepted, or $5,838.00, which it claims was the adjusted price. Respondent turned over the 1,662 trays which it allegedly rejected to Peter Condakes Company, Inc., Everett, Massachusetts, for consignment handling. Peter Condakes Company, Inc., obtained $7,610.00, from which it deducted 15 percent commission, or $1,141.50, for a net remittance of $6,468.50. Complainant claims the strawberries complied with the contract terms and insists on payment of the difference between the $19,854.00 contract price and the $5,838.00 and $6,469.50 received, or $11,541.10.

Respondent's attempted rejection of 1,662 trays was ineffective, as respondent clearly accepted the entire load. Respondent admittedly accepted 834 of the 2,496 trays. In addition, when the load was federally inspected on April 16, 1985, only 1,440 trays were present, with the remaining 1,056 trays having been unloaded, presumably for sale to respondent's customers (Finding of fact 5). Respondent's actions in unloading and admittedly accepting a large portion of the load were an exercise of dominion over the entire load and constituted acceptance thereof. *Farm Market Service, Inc. v. Albertson's Inc. a/t/a Southco Division*, 42 Agric. Dec. 429 (1983).

With respect to the 834 trays which respondent admits having accepted, respondent asserts that the contract price was adjusted from $7.65 per tray plus tectrol and Ryan to $7.00 per tray. Respondent has provided no details concerning this alleged adjustment, such who authorized it and when it occurred, and complainant has denied authorizing such adjustment. We conclude that respondent has failed to sustain its burden of proving a modification of the contract terms as to these 834 trays. See *Joe Phillips v. G & T Terminal Packaging Co., Inc.*, 42 Agric. Dec. 1199 (1983).

We now turn to respondent's claim that the strawberries were in poor condition. Since we have concluded that respondent accepted the entire truckload of strawberries, respondent became liable for the contract price, less damages resulting from any breach of warranty. It is respondent's burden

to prove the breach and damages by a preponderance of the evidence. *Stonoca Farms Corporation v. S & S Produce Inc.*, 42 Agric. Dec. 937 (1983). In an f.o.b. transaction such as this, the seller gives an implied warranty that the produce will be in suitable shipping condition, "a condition which, if the shipment is handled under normal transportation service and conditions, will assure delivery without abnormal determination at the contract destination agreed upon between the parties." 7 C.F.R. § 46.43(j). The April 16, 1985, inspection (Finding of Fact 5) showed an average of 24 percent damage by soft and mushy areas, seven percent damage by dry, sunken areas, and two percent decay. However, the inspection was taken on only 1,440 of the 2,496 rays of strawberries in the load. Respondent admits that it removed the best trawberries in the load for sale to its customers (Finding of Fact 4). Under imilar circumstances, we have held that such a limited inspection renders it mpossible to determine whether the product met good delivery standards. *futal Vegetable Sales v. Select Distributors, Inc.*, 38 Agric. Dec. 1359 (1979). we were to give any weight to the inspection at all, we would have to ssume the presence of the absent strawberries, in excellent condition, and calculate the percent of damage. Under these conditions, all 2,496 flats ould have exhibited an average of 14 percent damage by soft and mushy eas, four percent damage by dry, sunken areas, and one percent decay. cording to the Department's regulations, no grade strawberries at shipping int can have no more than 10 percent serious damage, with two to three rcent decay. 7 C.F.R. § § 51.3115 through 51.3124. The amount of damage owed at the point of delivery is obviously greater. However, in the case at nd, the inspection reveals only one percent decay and no other serious mage. This is not sufficient to indicate a breach of warranty. Moreover, the spection reveals high pulp temperatures of 43 and 44 degrees F., and ctuating transit temperatures (Finding of Fact 4). These circumstances pear to indicate abnormal transportation conditions, which would void the rranty of suitable shipping condition. *Bianchi & Sons Packing Co. v. Kelvin Ng. d/b/a Kin Yip Company*, 42 Agric. Dec. 292 (1983). It is, therefore, ar that there was no breach of the suitable shipping condition warranty mmitted by complainant in this case.

Respondent has failed to pay $11,541.10 of the $19,854.00 contract price, d such failure is a violation of section 2 of the Act, for which reparation ould be awarded, with interest.

Order

Within 30 days from the date of this order, respondent shall pay to mplainant, as reparation, $11,541.10, with interest thereon at the rate of 13 rcent per annum from June 1, 1985, until paid.

Copies of this order shall be served upon the parties.

MENDELSON-ZELLER CO., INC. v. GEORGE M. DZIAK d/b/a DZIAI PRODUCE CO.
PACA Docket No. 2-6639.
Order issued September 24, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultur Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A time complaint was filed in which complainant seeks reparation against responde in the amount of $14,104.75 in connection with a transaction involving tl shipment of mixed produce in interstate commerce.

On November 6, 1984, this matter was stayed pending completion respondent's bankruptcy.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

MILLS DISTRIBUTING COMPANY v. ANTHONY TAMMARO, INC.
PACA Docket No. 2-6687.
Order issued September 1, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultu Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A tim complaint was filed in which complainant seeks reparation against respond in the amount of $6,535.64 in connection with a transaction involving t shipment of lettuce in interstate commerce.

On May 20, 1985, this matter was stayed pending completion respondent's bankruptcy.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

FRANK MINARDO, INC. v. WESTMAN COMMISSION COMPANY.
PACA Docket No. 2-7611.
Order issued September 14, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultu Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A tim complaint was filed in which complainant seeks reparation against respond in the amount of $814.80 in connection with a transaction involving shipment of green onions in interstate commerce.

By letter dated August 20, 1987, complainant notified the Department that it no longer wished to pursue its claim.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

MYCO ENTERPRISES v. BOISE FARMERS MARKET, INC.
PACA Docket No. 2-7238.
Decision and order issued September 22, 1987.

Having received and accepted produce, respondent has burden to show seller breached contract - Where produce is held by purchaser for considerable time after shipment and acceptance, it must present evidence that produce is merchantable where latent defect is alleged.

Watermelons were embargoed and ordered destroyed by the State for alleged pesticide contamination, 19 days after receipt and acceptance by respondent. Respondent asked complainant for documentation of a growing field, but it was obtained after the fact. Held for complainant, as no evidence to prove melons were merchantable at time of embargo.

Alan R. Kahan, Presiding Officer.
Thomas R. Oliveri, for Respondent.
Respondent, pro se.
Decision issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $650.00, in connection with the sale of eight (8) bins of watermelons in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent. Respondent filed a verified answer to the complaint, generally admitting the factual allegations, admitting acceptance of the watermelons, but alleging that four bins had to be disposed of as a result of a health embargo placed on the watermelons by the State of Idaho health authorities.

The amount claimed in the formal complaint does not exceed $15,000.00 and the shortened method of procedure provided in section 47.20 of the Rule of Practice (7 C.F.R. § 47.20), is, therefore, applicable. Pursuant to thi procedure the verified pleadings of the parties are considered part of th evidence of this case, as is the Department's Report of Investigation. I addition, the parties were given an opportunity to file evidence in the form ' sworn statements. Complainant filed an opening statement with one verifi statement by a witness. Complainant filed a brief.

uncontroverted allegations that on July 11, 1985, it asked complainant to furnish proof that the field from which the melons were harvested had not been contaminated with the pesticide, Aldecarb, that complainant immediately secured such proof, but failed to provide it until many months later, far too late to help respondent. We need not decide whether complainant breached a duty to respondent by failing to deliver proof of the growing condition of the watermelons in a timely fashion, or whether the respondent must bear the risk of governmental intervention.

Respondent provided no reliable evidence as to the condition of the watermelons on the date of the embargo. No inspection, federal or otherwise, was taken of their condition. No evidence was presented by respondent regarding the condition the watermelons were stored at. Agriculture Handbook Number 66, "The Commercial Storage of Fruits, Vegetables and Florist and Nursery Stock, with respect to watermelons:

> Watermelons are not adapted to long storage. At low temperatures they are subject to various symptoms of chilling injury and loss of quality, and at high temperatures they are subject to decay. Between 10° and to 15° C. (50 to 50° F.) is a good compromise. Watermelons should keep at this temperature range for 2 to 3 weeks; some will keep longer. Melons held 6 weeks at room temperature will have poor flavor. (at 62)

The period of time involved from receipt and acceptance of the watermelons until the date of the embargo, approached the end point of the 2 to 3 week "keeping period." Thus, the conditions under which the watermelons were stored becomes critical. If stored outside under non-temperature controlled conditions during the period of late June to mid July, at temperatures above 60° F., it would be logical to conclude that their quality would suffer at a somewhat faster rate. Given that the record of this case provides no evidence of the watermelons' condition on July 11th, and given the likelihood that the storage conditions had higher temperatures than what is recommended by the Department's handbook, which would result in faster deterioration, we cannot find the produce was in merchantable condition July 11, 1985, which would be necessary to find the complainant breached a duty.

We recognize that section 2-607 of the Uniform Commercial Code provides that where the goods have ben accepted, the buyer must within a reasonable time after he discovers any breach notify the seller of the breach or be barred from any remedy. Section 2-714 of the Uniform Commercial Code provides that when goods have been accepted and the seller has been given notification, the buyer may recover as damages for any non-conformit of the goods the loss resulting from the seller's breach. Section 2-717 of th Uniform Commercial Code provides that the buyer may deduct all or an portion of the damages as a result of the breach from any part of the pri still due under the same contract. Under the proper circumstances, we mig find a breach of contract by the seller, where produce has been accepted bu

is later found to be unmerchantable. However, the facts of this case do not justify such conclusion.

Complainant is entitled to the purchase price less any damages sustained by respondent. Respondent has not sustained its burden of proving any damages. The contract price was for $650.00 for the eight bins of watermelons. Respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

Order

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $650.00 with interest thereon at the rate of 13% per annum from August 1, 1985, until paid.

Copies of this order shall be served upon the parties.

NOGALES FRUIT & TOMATO DIST., INC. v. JEROME GROSSMAN d/b/a JEROME BROKERAGE DIST. CO.
PACA Docket No. 2-7037.
Order issued September 10, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER ON RECONSIDERATION

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), a Decision and Order was issued on July 27, 1987, requiring respondent to pay reparation, in the amount of $5,733.05 plus interest, to complainant. On August 17, 1987, the respondent filed a petition for reconsideration.

Respondent's petition raises no contentions or issues which were not raised and fully considered in our order of July 27, 1987. In our opinion, the July 27, 1987, Decision and Order is supported by the evidence and the law applicable thereto. Accordingly, respondent's "Motion for Reconsideration" is denied without prior service on complainant.

The order of July 27, 1987, is reinstated except that respondent has 30 days from the date of issuance of this order in which to pay complainant the reparation awarded therein.

Copies of this order shall be served upon the parties.

NORDEN FRUIT COMPANY, a/t/a CAL FRUIT v. C&D FRUIT & VEGETABLE CO., INC.
PACA Docket No. 2-6974.
Decision and order issued September 11, 1987.

Rejection must be in clear and unmistakable terms - Once shipment is accepted burden of proving a breach of contract and damages is on the buyer.

Three trucklots of strawberries were sold by complainant to respondent. After acceptance, respondent placed one of the shipments in storage at unreasonable high temperature for three days. Held; any condition problems were caused by improper storage. Remaining two shipments - documentation showed a price modification justifying respondent's deductions.

Jory M. Hochberg, Presiding Officer.
Complainant, pro se.
H. Roger Lutz, for Respondent.
Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter "the Act." A timely complaint was filed in which complainant seeks an award of reparation against respondent in the total amount of $3,737.10 in connection with the sale of three trucklots of strawberries in interstate commerce. A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent. Respondent filed an answer on October 7, 1985, denying any liability to the complainant.

Since the amount claimed as damages does not exceed $15,000.00, the shortened method of procedure set forth in the Rules of Practice (7 C.F.R. § 47.20) is applicable. Under this procedure, the verified pleadings of the parties are considered a part of the evidence herein, as is the Department's report of investigation. The parties also filed additional evidence in the form of sworn statements. Both parties were given the opportunity to file briefs, but neither party did so.

Findings of Fact

1. Norden Fruit Co., d/b/a Cal Fruit, is a corporation whose business mailing address is P. O. Box 21394, Market Station, Los Angeles, California 90021.

2. C&D Fruit & Vegetable Co., Inc., is a corporation whose business mailing address is P. O. Box 898, Bradenton, Florida 33506. At the time of the transactions involved herein, respondent was licensed under the Act.

3. On or about December 27, 1984, in the course of interstate commerce, complainant by oral contract sold to respondent 480 flats of strawberries at the agreed price of $8.90 per flat plus $.60 for precooling, for a total purchase price of $4,560.00, F.O.B.

4. On or about December 27, 1984, in the course of interstate commerce, complainant by oral contract sold to respondent 96 flats of strawberries at an initially quoted price of $8.90 per flat plus $.60 for precooling, for a total purchase price of $912.00, F.O.B.

5. On or about December 29, 1984, in the course of interstate commerce, complainant by oral contract sold to respondent 96 flats of strawberries at an

initially quoted price of $8.90 per flat plus $.60 for precooling, for a total purchase price of $912.00, F.O.B.

6. On or bout December 28, 1984, complainant shipped from loading point in Florida to ıespondent in Texas, the kind, quality, grade and size of commodity called for by the contract referred to in Finding of Fact No. 3 above.

7. On or about December 27, 1984, complainant shipped from loading point in Florida to respondent in Texas, the kind, quality, grade and size of commodity called for by the contract referred to in Finding of Fact No. 4 above.

8. On or about December 29, 1984, complainant shipped from loading point in Florida to respondent in Texas, the kind, quality, grade and size of commodity called for by the contract referred to in Finding of Fact No. 5 above.

9. Respondent accepted the three trucklots of strawberries, and was billed a total of $6,384.00 for these shipments. However, respondent deducted $3,554.70 for the shipment referred to in Findings of Fact Nos. 4 and 7 above, and $182.40 from the amounts billed for the two remaining shipments, for a total deduction of $3,737.10, which amount has still not ben paid to the complainant.

10. The complaint in this proceeding was filed on February 22, 1985, which was within nine months after the cause of action herein accrued.

Conclusions

The record in this proceeding supports an order requiring respondent to pay complainant the $3,554.70 deducted by respondent on the shipment of the 480 trays of strawberries. Respondent claims that it rejected this shipment because the strawberries were not of the kind, quality, grade and size called for by the contract and that 222 of the trays were eventually dumped. On the basis of the record as a whole, however, it is clear that respondent accepted the strawberries. It has consistently been held that a rejection must be in clear and unmistakable terms. A mere complaint about a shipment does not constitute a rejection. *United Packing v. Connecticut Celery Co.*, 16 Agric. Dec. 810 (1957); *Hunt v. Humboldt Foods, Inc.*, 20 Agric. Dec. 236 (1961). Respondent's sworn statements themselves indicate that a clear rejection was not communicated to complainant. Therefore, the shipment was accepted by respondent, and the burden of establishing a breach of contract and resulting damages from breach of contract becomes that of the respondent. *M.J. Duer & Co., Inc. v. Rothman Pickle Products, Inc.*, 20 Agric. Dec. 255 (1961); *Maloney v. Frank's Food Fair*, 20 Agric. Dec. 259 (1961).

While respondent did not obtain a dump certificate to corroborate its claim that 222 trays of these 480 trays of strawberries were dumped, such a certificate would still not entitle it to damages since the record establishes that respondent handled the strawberries improperly. The 44° F. temperature at which the strawberries were maintained during the three-day storage period, as noted on the December 31, 1984, inspection certificate, was not a proper condition for storage. Not only does complainant's bill of lading state that the strawberries should be maintained at between 35 and 36° F. during transportation, but Agriculture Handbook 66 shows that 32° F. would be the proper temperature for this highly perishable commodity during storage; THE

COMMERCIAL STORAGE OF FRUITS, VEGETABLES AND FLORIST AND NURSERY STOCKS, United States Department of Agriculture, Agricultural Research Service, Agriculture Handbook 66, p. 38. Accordingly, any damages which resulted in the need to dump this shipment were due to respondent's improper storage after acceptance.

With respect to the remainder of the amount in dispute, concerning the two shipments of 96 trays each, respondent claims that while complainant's originally quoted price was $8.90 per flat, plus $.60 precooling, the parties agreed during negotiations to decrease the prices for these two shipments. While complainant contends that no price change was agreed to, complainant's invoices, attached as exhibits to its complaint, contain handwritten notations reducing the $8.90 price. Since complainant has not attempted to explain these notations, we must conclude that the parties agreed to the reductions as alleged by the respondent and as shown on its accounting.

Accordingly, respondent owes to complainant the $3,554.70 deducted from the shipment of the 480 trays. Respondent's failure to pay complainant this amount is a violation of section 2 of the Act for which reparation should be awarded.

Order

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, $3,554.70 with interest thereon at the rate of 13% per annum from February 1, 1985, until paid.

Copies of this order shall be served upon the parties.

PANDOL BROTHERS, INC. V. HARBOR BANANA DISTRIBUTORS, INC.
PACA Docket No. 2-5807.
Order issued September 1, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $174,000.00 in connection with transactions involving the shipment of 32 truckloads of bananas in interstate commerce.

On August 4, 1982, this matter was stayed pending completion of respondent's bankruptcy.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

PEARSON AND LANE PACKING COMPANY v. MORENO PRODUCE COMPANY.
PACA Docket No. 2-6189.
Order issued September 24, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $7,124.00 in connection with a transaction involving the shipment of peaches in interstate commerce.

On May 12, 1985, this matter was stayed pending completion of respondent's bankruptcy.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

PRODUCE PRODUCTS, INC. v. ARIZONA FRESH FOODS, INC.
PACA Docket No. 2-5869.
Order issued September 1, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $53,466.00 in connection with ten transactions involving the shipment of potatoes in interstate commerce.

By letter dated July 28, 1987, complainant notified the Department that the parties had amicably settled. Complainant, in its letter of July 28, 1987, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

GRADY PRUETTE v. MORENO PRODUCE COMPANY.
PACA Docket No. 2-6152.
Order issued September 24, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent

in the amount of $14,331.10 in connection with a transaction involving the shipment of tomatoes in interstate commerce.

On August 1, 1983, this matter was stayed pending completion of espondent's bankruptcy.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

URE GOLD, INC. v. MORENO PRODUCE COMPANY.
ACA Docket No. 2-6151.
rder issued September 23, 1987.

der issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural ommodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely nplaint was filed in which complainant seeks reparation against respondent the amount of $4,868.75 in connection with a transaction involving the pment of lemons in interstate commerce.

On May 12, 1983, this matter was stayed pending completion of pondent's bankruptcy.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

NCHO VERGELES, INC. v. RICHARD SHELTON, d/b/a MID-VALLEY OKERAGE COMPANY.
CA Docket No. 2-7081.
der issued September 3, 1987.

der issued by Donald A. Campbell, Judicial Officer.

ORDER ON RECONSIDERATION

In this reparation proceeding under the Perishable Agricultural ommodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), an order was sued on June 8, 1987, awarding reparation to complainant against spondent. A copy of this order was served upon respondent on June 15, 987. On June 18, 1987, respondent filed a petition for reconsideration of e order of June 8, 1987. On July 7, 1987, the order of June 8, 1987, was ayed and complainant was granted 15 days from date of service of the stay rder to file a reply to respondent petition. On July 29, 1987, complainant led a reply to the petition.

We have reconsidered the order of June 8, 1987, and find that spondent's contentions in his petition are without merit and that the order

is supported by the evidence and the law applicable thereto. Accordingly, respondent's petition should be and hereby is dismissed.

Complainant in its reply to respondent's petition requests that the order of June 8, 1987, be amended to call for the payment by respondent of $6,147.00 instead of the $5,544.30 which we awarded, on the ground that complainant never received payment of the March 11, 1985, $602.70 check sent by respondent to complainant. Complainant attached a copy of a letter to its reply showing that the check was returned. We have examined the record and note that the Department's report of investigation contains an exchange of letters between the Department and respondent in which respondent refused to release the March 11, 1985, check as an undisputed amount. Accordingly, we conclude that amendment of the June 8, 1987, order is proper. Such order is hereby amended to require the payment by respondent to complainant of reparation in the amount of $6,147.00, with interest at the rate of 13 percent per annum from March 1, 1985 until paid. Such reparation shall be paid within 30 days from the date of this order.

Copies of this order shall be served upon the parties.

ROEDER LAND & CATTLE CO., d/b/a ROEDER'S POTATOES v. NEBRASKA POTATO SHIPPERS, INC.
PACA Docket No. 2-7531.
Order issued September 10, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $4,090.00 in connection with a transaction involving the shipment of potatoes in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated August 24, 1987, complainant notified the Department that respondent tendered to complainant a check in full settlement of complainant's claim. Complainant, in its letter of August 24, 1987, authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

ROYAL FRUIT CO., INC. v. ACOSTA GROVES - DIVISION OF LALI, INC.
PACA Docket No. 2-6920.
Decision and Order issued September 3, 1987.

Inspections too remote in time are not valid - Affidavits of interested and disinterested parties as to condition of produce not a substitute for federal inspection - Respondent failed to sustain its burden of proof that fruit was of unmerchantable condition - Audit accounting of transaction, conducted by USDA is fair and reasonable, given respondent has no records or documentation to justify its account.

Respondent accepted two consignments of limes from complainant. Respondent claimed breach of contract on basis of limes arriving in deteriorated condition. No federal inspection of limes on receipt, nor were sufficient records and documentation kept by respondent to justify its accounting to complainant. Judgment for complainant for $9,285.08.

Allan R. Kahan, Presiding Officer.
Donato D. Ramos, for Complainant.
J. David Liekman, for Respondent.
Decision issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in connection with the sale of two truckloads of Persian Limes in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent. Respondent filed an answer denying liability and claimed a breach of warranty by complainant.

The amount claimed in the formal complaint does not exceed $15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20), is, therefore, applicable. Pursuant to this procedure the verified pleadings of the parties are considered part of th evidence of this case, as is the Department's Report of Investigation. i addition, the parties were given an opportunity to file evidence in the form o sworn statements. Respondent filed an answering statement, with three verified statements by witnesses, as well as a brief. Complainant filed nc further evidence.

Findings of Fact

1. Complainant is a corporation whose address is Post Office Box Laredo, Texas 78042-0006. At the time of the transactions involved her complainant was licensed under the Act.

2. Respondent is a corporation whose address is P. O. Box 970243, Miar Florida 33197. At the time of the transactions involved herein, respondent w licensed under the Act.

3. On January 6, 1984, complainant consigned 1081 cartons of limes respondent to repack and sell for complainant's account.

4. On January 6, 1984, complainant shipped the limes to responde place of business. Upon arrival, respondent accepted the limes and sold th for the account of complainant.

5. On January 13, 1984, complainant consigned 875 cartons of limes respondent to repack and sell for the account of complainant.

6. On January 13, 1984, complainant shipped the limes set forth in paragraph 5 to respondent's place of business. Upon arrival, respondent accepted the limes and sold them for the account of complainant.

7. On March 22, 1984, respondent remitted $4,131.45 in payment for the two shipments of limes.

8. An informal complaint was filed on March 12, 1984, which was within nine months after the cause of action herein accrued. The formal complaint was filed March 19, 1985.

Conclusions

Respondent's defense to complainant's action herein is the allegation that complainant breached the contract by supplying limes which arrived in a deteriorated condition. Respondent alleges a breach of contact apparently based upon the limes being in unmerchantable condition. Although there is dispute as to under what terms and conditions the respondent accepted the limes to sell on complainant's behalf, the evidence is clear that respondent accepted the limes, and did not reject them. REspondent, as the moving party with the burden of proving that the produce was unmerchantable or of sufficiently poor quality to justify the less than market price, points to the affidavits and the federal inspection certificates taken on or about January 16 and 30, 1984.

The federal inspection made on January 16, 1984, relates to the second load of limes, consigned to respondent by complainant on January 13, 1984. The 875 cartons of limes graded U.S. combination, with an average of 7% damage by yellowing, 1% styles and breakdown and less than 1% decay. The other inspection certificate, dated January 30, 1984, deals with 400 cartons of limes, with the fruit in significantly greater deteriorated condition. However, the documentation does not identify to which shipment of limes this inspection relates, nor does it necessarily deal with a representative sample of the limes complainant shipped. Even if this inspection is accepted as pertaining to one or the other shipments here involved, it is the two or three weeks after the fruit was delivered and accepted by respondent, and thus is too remote in time to be representative of the condition of the limes on arrival.

The affidavits, too, must be rejected. The affidavit of Mr. Silverman is obviously that of an interested party, as Mr. Silverman is an employee of respondent. The affidavit of Mr. Porter, although possibly disinterested, does not state with sufficient specificity the degree of yellowing decay and deterioration for a determination of the product's condition to be made. Nor does Mr. Porter state the number of boxes he examined, whether they were representative of the load in general; or what identifying markings, if any, were on the containers to have him conclude that the limes be examined were, in fact, the limes at issue in this proceeding.

An examination of the January 16, 1984, inspection certificate clearly show that the 875 cartons of limes which were shipped on January 13th, graded U.S. combination, clearly constituting marketable and merchantable quality produce. The inspection certificate of January 30th shows limes in a substantially poorer condition. However, this inspection comes approximately 24 days after the first shipment arrived and two weeks after the second shipment arrived. As respondent presented no vidence to detail the temperature and conditions the limes were held under from the time of their

arrival to the date of the inspection, the three week period is too remote from the date of arrival to accurately describe the condition of the limes on their arrival date. Therefore, since there is no credible evidence which shows otherwise, we must assume the second shipment of limes, consisting of 1081 crates which arrived at respondent's place of business on January 15th, also would have graded U.S. combination, and was of merchantable condition and quality.

We are thus left with the respondent failing to sustain its burden of proof with respect to his allegation that the limes were in generally unmerchantable condition. This being so, the question of damages remains. Section 46.29(a) of the regulations promulgated under the Perishable Agricultural Commodities Act (7 C.F.R. Part 47.29(a) provides, in relevant portion:

> § 46.29 Duties.
> (a) General. All licensees who accepted produce for sale on consignment or on joint account are required to exercise reasonable care and diligence in disposing of the produce promptly and in a fair and reasonable manner. A commission merchant engaged to sell consigned produce may not employ another person or firm, including auction companies, to dispose of all or part of such produce without the specific prior authority of the consignor. A commission merchant is not authorized to sell consigned produce outside the market area where he is located without obtaining the permission of the consignor. Averaging or pooling of sales is not permissible unless the receiver obtains the specific written permission of the consignor prior to rendering the accounting. Complete and detailed records shall be prepared and maintained by all commission merchants and joint account partners covering produce received, sales, quantities lost, dates and cost of repacking or reconditioning, unloading, handling, freight, demurrage or auction charges, and any other expenses which are deducted on the accounting, in accordance with the provisions of § 46.18 through § 46.23. When rendering account sales for produce handled for or on behalf of another, an accurate and itemized report of sales and expenses charged against the shipment shall be made. It is a violation of section 2 of the act to fail to render true and correct accounting in connection with consignments or produce handled on joint account. Charges which cannot be supported by proper evidence in the records of the commission merchant or joint account partner shall not be deducted. The commission merchant or joint account partner may be held liable for any financial loss and for other penalties provided by the act, due to his negligence or failures to perform any specification or duty, express or implied, arising out of any transaction subject to the act.

A personal investigation of the matter was made by investigators of the Department who conducted a complete audit of the relevant records kept and maintained by respondent. An audit accounting was made, and it relied on the records required to be kept and maintained under section 46.29 of the regulations.

Respondent also made an accounting, which was submitted as evidence, supporting the amount it claims is rightfully due complainant. Respondent's accounting has a number of deficiencies. It relies on prices for a portion of the limes involved for which it was unable to provide documentary support from its records. It relied on the evidence detailing consignment sales of some of the limes to firms in Massachusetts, New York and Illinois, although it did not have written authorization from the respondent to ship the limes out of the market area. It relied on evidence showing it gave allowances on shipments which were billed at set prices, but no evidence was found as to why the allowances were granted or substantiating their validity. The regulations, however, require "complete and detailed records" which respondent chose not to prepare and/or maintain. Respondent's accounting, therefore, cannot be accepted, as the supporting and verifying documentation does not exist in respondent's records.

The audit accounting prepared by the Department relied on the documentation contained in respondent's records. For the first load of limes, the Department's accounting found that 114 cartons of Mexican limes sold for $21.75; that 200 cartons, which respondent claimed it sold for $1.00 per carton but for which no verifying documentation could be found in respondent's records, were valued at the average sales price for Mexican limes for that period, equalling $4,020.00. In addition, 767 of the cartons were repacked into 1026 - 10 pound pony boxes, 500 having a value of $1,185.00; and 526 having a value of $833.00. Finally, the audit accounting found 19,682 pounds of culls and juice netted $700.00, for a gross proceeds of $9,217.50. From this amount, respondent was entitled to commission of 10% which equalled $921.75, and repacking expense of $1.15 for each of the 1026 pony, which equals $1,179.90, for total expenses of $2,101.65. The net proceeds determined by the audit accounting equals $7,115.85; a difference of $4,934.41 from the net proceeds determined by respondent and remitted to complainant with respect to the first load of limes.

As to the second load of limes, the Department's audit accounting found that 25 cartons sold for a total of $225.00; 190 cartons sold for a total of $530.00; and 190 cartons sold for a total of $520.00. Respondent repacked 470 cartons, which yielded 1075 - 10 pound pony boxes; 250 which sold for a total of $1,875.00, and 825 which sold for $6,020. Within the 470 cartons, 8,050 pounds of the limes were culls and sold for juice. The audit accounting determined that respondent should have accounted for $9,368.92 realized from the sale of the second load. From this amount, respondent was entitled to a legitimate deduction of commission expenses of 10%, or $936.89, and repacking expenses of $1.15 per box for the 1075 pony boxes, or $1,236.25, for net proceeds of $7,195.78. Respondent accounted to and paid complainant $1,950.01 for this second load, which constitutes an underpayment of $5,245.77, under the analysis done by the Department's audit accounting.

The audit account is a fair and reasonable determination of the amount due complainant on both loads of limes, given the fact that respondent was

without proper documentation and records to justify its accounting. *Magic Valley Potato Shippers, Inc. v. Morris Nathan Produce Co., Inc.*, 42 Agric. Dec. 450, 452 (1983)

Respondent accepted the limes and sold them on behalf of complainant, but failed to properly account for said sales. Respondent is, therefore, liable to complainant for the difference between the net proceeds determined to be due by reason of the audit accounting, $10,180.18, less the undisputed amount paid by respondent in addition to the original accounting, $895.10, or a total amount due of $9,285.08. Respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

Order

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation $9,285.08 with interest thereon at the rate of 13% per annum from March 1, 1984, until paid.

Copies of this order shall be served upon the parties.

'ALINAS MARKETING COOPERATIVE v. TOM LANGE COMPANY, INC.
'ACA Docket No. 2-7092.
'ecision and order issued September 3, 1987.

cceptance by diversion - Burden of proving breach of warranty - Burden of proving iodification of contract terms - Burden of proving transportation conditions were normal.

Respondent accepted the truckload of lettuce by diverting it to its buyer, since its contract with complainant did not provide for delivery to anyone other than respondent. Respondent thus became liable for the contract price, less damages due to any breach of warranty, which respondent has the burden of proving. Respondent claimed that the f.o.b. contract terms were changed to a consignment, but failed to sustain its burden of proving such a change, since the evidence showed that the proposed change was contingent on further discussions, which never took place. Respondent failed to sustain burden of proving a breach of warranty, as it failed to prove that transportation conditions were normal. Thus, respondent found liable for the contract price. Respondent's counterclaim was dismissed.

Andrew Y. Stanton, Presiding Officer.
Thomas R. Oliveri, for Complainant.
Respondent, pro se.
Order issued by Donald A Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultura Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timel complaint was filed in which complainant seeks an award of reparation agains respondent in the amount of $2,700,00 in connection with a trucklot of lettuce sold to respondent in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability and asserting

a counterclaim for $515.37 in connection with the subject matter of the complaint. Complainant filed a reply thereto, denying liability.

Since the amount claimed as damages in the complaint or counterclaim does not exceed $15,000.00, the shortened of procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20), is applicable. Pursuant to such procedure, the report of investigation is considered part of the evidence, as are the verified complaint, answer and reply. The parties were given an opportunity to submit additional evidence in the form of verified statements and to file briefs. Complainant submitted an opening statement. Respondent elected not to submit any additional evidence. Complainant also filed a brief.

Findings of Fact

1. Complainant, Salinas Marketing Cooperative, is a corporation whose address is P. O. Box 3860, Salinas, California. At the time of the transaction alleged in the counterclaim, complainant was licensed under the Act.

2. Respondent, Tom Lange Company, Inc., is a corporation whose address is P. O. Box 4701, Springfield, Illinois. At the time of the transaction alleged in the complaint, respondent was licensed under the Act.

3. On Approximately June 26, 1985, complainant sold to respondent 850 cartons of lettuce at a price of $2.50 per carton plus $.65 per carton cooling and $22.50 for a temperature recorder, for a total of $2,700.00, f.o.b. The contract provided that good delivery standards would apply, excluding bruising and/or discoloration following bruising. The contract did not provide for shipment to anyone other than respondent.

4. During loading, complainant had the lettuce inspected by the Monterey County Agricultural Commissioner for pulp temperature. The inspection report shows that the inspection took place on June 26, 1985, from 5:40 p.m. to 5:55 p.m. A total of 17 samples were taken of the 850 cartons. Of these, five were found to be at 35° F., one at 35.5° F., ten at 37° F., and one at 37.5° F.

5. The truck departed complainant's warehouse at 6:10 p.m. on June 26, 1985, according to the bill of lading. Respondent had it diverted to the place of business of one of its customers, John R. Hoffman, Jr., Produce Co., Louisville, Kentucky, where it arrived the morning of July 1, 1985, and was federally inspected at 7:15 a.m. and 2:40 p.m. that day, with each inspection covering a different part of the load. The 7:15 a.m. inspection found as follows, in relevant part:

> Products Inspected: Iceberg type LETTUCE in cartons printed "Stately Brand Lettuce Salinas Marketing Cooperative Salinas, Ca. 2 Doz. Heads."
> Applicant states 200 cartons. See "REMARKS".
>
> Condition of Load: Through load 4 rows crosswise, 7 rows upright, 6 layers.
>
> Condition of Pack: Tight.

> Temperature of Product: At rear doors: Top 47 F., Bottom 52 F.
>
> Condition: Heads or portions of heads not affected by condition defects are fresh and crisp. Wrapper leaves only: No decay. Head leaves: Damage by Tipburn average 1%. Decay range 1 to 3 heads per carton average 8% Bacterial Soft Rot in advanced stages.
>
> Remarks: Inspection and certificate restricted to product and lading in all layers 7 stacks nearest rear door made accessible by applicant. Trailer contains other lettuce not offered for inspection.

The 2:40 p.m. inspection found as follows, in relevant part:

> Products Inspected: Iceberg type LETTUCE in cartons printed "Stately Brand Lettuce Salinas Marketing Cooperative Salinas, Ca. 2 Doz. Heads."
> Applicant states intact portion of load consists of 500 cartons, Inspector's count 150 cartons palletized portion of load. See "Condition of Load".
>
> Condition of Load: Partly unloaded to approximately ½ trailer length. 4 rows crossways, 7 rows upright, 6 layers, 5 pallets stacked at rear of trailer.
>
> Condition of Pack: Tight.
>
> Temperature of Product: Intact portion: Nearest Rear Doors: Top 44F, 48F, 45F, and 45F. 3rd layer from floor: 54F and 52F. Bottom: 54F, 61F, and 60F. Palletized portion: In various locations: 53F, 47F, 54F, 46F, 47F, 52F, 54F, and 57F.
>
> Condition: Heads or portions of heads not affected by condition defects are fresh and crisp. Intact portion Wrapper Leaves only: No decay. Head Leaves: Damage by Tipburn average 1%. Decay most samples range 1 to 5 heads some none, average 8% being Bacterial Soft Rot in advanced stages. Palletized portion: Wrapper Leave Only: No decay. Head Leaves: Damage by Tipburn average 2%. Decay average 2%.
>
> Remarks: Inspection and certificate restricted to product and lading in all layers 3 stacks nearest rear door intact portion of load and all layers palletized portion . . . .

6. The Ryan temperature recorder showed that a consistent 34° F. wa maintained throughout transit.

7. Upon receiving the inspection results, respondent's customers refused to accept delivery. Respondent's manager, Wally Lampertz, then notified complainant's sales agent, Mark McBride, of the inspections and attempted rejections. After discussing the matter, they agreed to have the temperature recorder calibrated by the manufacturer, Ryan Instruments, Inc., Kirkland, Washington, to determine if it was functioning properly. They also agreed that until they received the results of the temperature recorder analysis, respondent was authorized to handle the lettuce for complainant's account. There was no further consultation between the parties afteı they received the results of the temperature recorder test.

8. In a letter to the Department of Agriculture dated August 9, 1985, respondent's manager, Willy Lampertz, stated as follows concerning his agreement with complainant's sales agent, Mark McBride:

> After reviewing the inspection and studying the temperature recorder tape, Mark and I decided to have the Ryan calibrated by Ryan Instruments, Inc. to determine if the Ryan was operating properly. Mark also gave me authority to have Hoffman handle the lettuce for shipper's account pending the results of the Ryan test.

9. The parties received a letter from Ryan Instruments, Inc., dated July 24, 1985, which read as follows, in pertinent part: "Ryan # 397997 returned to our Kirkland plant on July 8, 1985. Upon testing, it was determined the temperature sensor was reading 3° to 5° low throughout the temperature range. The chartdrive mechanism was accurate as to time."

10. Respondent sent complainant a statement indicating that there was a balance due to respondent of $515.37. This was determined by deducting $3,100.00 for freight and $127.50 for brokerage from the $2,712.13 remitted to respondent from its customer, John R. Hoffman, Jr., Produce Co. Respondent also provided a statement from its customer showing that $3,135.00 had ben obtained on resale, from which $78.60 had been deducted for the cost of two inspections, $360.77 for a 12% commission, and $22.50 for the cost of the Ryan temperature recorder, leaving $2,712.13 as the net balance due.

11. Respondent has not paid complainant any part of the $2,700.00 which complainant alleges to be due and owing, nor has complainant paid respondent the $515.37 which respondent alleges is due and owing.

12. A formal complaint was filed on November 1, 1985, which was within nine months from when the cause of action alleged herein accrued. A timely counterclaim dealing with the subject matter of the complaint was filed on January 14, 1986.

Conclusions

Complainant claims that respondent owes the contract price of $2,700.00 for 850 cartons of lettuce sold to respondent on an f.o.b. basis. Respondent denies liability, contending that the contract terms were changed to a consignment because of excessive decay in the lettuce upon its delivery at the place of business of respondent's customer, John R. Hoffman,Jr., Produce Co., Louisville, Kentucky. Respondent has filed a counterclaim for $515.37, the amount it allegedly lost in handling the lettuce for complainant's account.

It is clear that respondent accepted the lettuce, even though it claims that he lettuce was rejected by John R. Hoffman, Jr., Produce Co. upon delivery o that firm. Respondent's acceptance stems from the fact that, at the time : entered into the contract with complainant, respondent was the intended eceiver, as there was no provision for shipment to anyone other than espondent (Finding of Fact 3). Respondent's diversion of the lettuce to a estination different than that contemplated by the contract constituted cceptance. *Green Valley Produce Co-op v. Pupillo Fruit Company*, 40 Agric. 'ec. 1176 (1981).

Having accepted the lettuce, it became respondent's obligation to pay the ntract price in this f.o.b. transaction, less damages resulting from any breach warranty by respondent. Respondent has the burden of proving the breach d damages by a preponderance of the evidence. *Rogelio C. Sardina d/b/a rdinas Farms v. Caamano Bros., Inc.*, 42 Agric. Dec. 1275 (1983). However, spondent claims that it mutually agreed with complainant to change the ntract terms to a consignment, in view of the excessive decay found to be sent in the lettuce by the July 1, 1985, federal inspection. As the party ging a modification of the original contract terms, respondent has the den of proving such modification by a preponderance of the evidence. *Joe llips, Inc. v. G&T Terminal Packaging Co., Inc.*, 42 Agric. Dec. 1199 (1983). er examining the evidence, it is our conclusion that respondent has failed ustain its burden of proof.

The contract modification allegedly took place in a conversation between pondent's manager, Wally Lampertz, and complainant's salesagent, rk McBride, immediately after Mr. Lampertz had been advised by pondent's customer of the results of two federal inspections of the lettuce en on July 1, 1985. According to Mr. Lampertz in a letter to the partment of Agriculture dated August 9, 1985, he and Mr. McBride cided to have the Ryan temperature recorder calibrated by Ryan struments, Inc., to determine if it was operating properly. Mr Lampertz ited that "Mark also gave me authority to have Hoffman handle the lettuce r shipper's account pending the results of the Ryan tape." (Finding of Fact

Mr. Lampertz obviously perceived Mr. McBride's grant of authority to ındle the lettuce for complainant's account to be contingent on the tes sults of the Ryan tape. Therefore, it was clearly understood that an rmanent change in the contract terms to a consignment would only com out if such an agreement were reached after the test results were receivec he parties eventfully received a response from Ryan Instruments, Inc., statin at the temperature recorder was registering from three to five degrees low Finding of Fact 9) However, there is no evidence of any further discussio etween the parties concerning the effect of this response on complainant' ontingent authorization to respondent to handle the lettuce for its accoun 'herefore, we conclude that there never was any final determination made t hange the contract terms. Accordingly, respondent has failed to sustain it urden of proving that such a change was agreed to.

There remains to be decided the issue of whether complainant committed ny breach of warranty, due to the condition of the lettuce as found by the uly 1, 1985, inspections. In f.o.b. sales such as this, the seller gives an

implied warranty of suitable shipping condition (7 C.F.R. § 46.43(i)). In accordance therewith, the seller warrants that the commodity, at shipping point, will be in a condition which, if the shipment is handled under normal transportation service and conditions, will assure delivery without abnormal deterioiation at the contract destination agreed upon between the parties (7 C.F.R. § 46.43(j)). The July 1, 1985, inspections found the lettuce to be abnormally deteriorated, exhibiting an average of 6.9% decay, which is 1.9% greater than the five percent maximum permitted under the Department's regulations (7 C.F.R. § 46.44(a)(2)). However, the inspections were not taken at the contract destination, Springfield, Illinois, but at the place of business of respondent's customer in Louisville, Kentucky. The warranty of suitable shipping condition was not applicable beyond the contract destination, *Barbara Packing Corporation v. The Grand Union Company*, 28 Agric. Dec. 763 (1969), and it is unclear whether the amount of decay at the contract destination would have been excessive upon delivery. Even if it would have been excessive, the inspection reports appear to show abnormal transportation conditions, which would void the suitable shipping condition warranty, as they reveal pulp temperatures ranging from 44° F. through 61° F., which are too high. In addition, complainant subjected the lettuce to a State of California inspection during the loading process, which found the pulp temperatures at the time to range from 35° F. to 37.5° F. (Finding of Fact 4). This is strong evidence that the increase in pulp temperature occurred during transit. This strong evidence of abnormal transportation condition seems to be contradicted by the Ryan temperature recording tape, which shows that a temperature of approximately 34° F. was maintained in the truck throughout shipment. However, the reliability of the tape was severally compromised by the analysis of Ryan Instruments, Inc. We have stated that it is respondent's burden to prove a breach of warranty. As part of such proof, respondent must show that transportation conditions were normal. *R. F. Taplett Fruit & Cold Storage Co. v. Joseph Northwest*, 19 Agric. Dec. 411 (1960). It is our conclusion that, based on the evidence in the record, respondent has failed to sustain this burden.

Therefore, respondent is liable for the contract price of $2,700.00, and its failure to pay this amount to complainant is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

Respondent has demonstrated no grounds for recoveiy on its counterclaim, and it must be dismissed.

Order

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $2,700.00, with interest thereon at the rate of 13 percent per annum from August 1, 1985, until paid.

Respondent's counterclaim is hereby dismissed.

Copies of this order shall be served upon the parties.

SHIPLEY SALES SERVICE v. PAMCO AIR FRESH, INC., and/or VISTA McALLEN, INC., and/or VISTA McALLEN NOGALES, INC., and/or M.E.G. DISTRIBUTORS, INC.
PACA Docket No. 2-7568.
Order issued September 4, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER REOPENING AFTER DEFAULT

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), respondent M.E.G. Distributors Inc., failed to file a timely answer. However, prior to the issuance of a Default Order, respondent M.E.G. Distributors, Inc., filed a motion to reopen the proceeding after default and allow the filing of an answer pursuant to section 47.25 of the Rules of Practice (7 C.F.R. 47.25(e)).

The record has been carefully considered and it is concluded that the motion to reopen was filed within a reasonable time, and that good reason has been shown why the relief requested in the motion should be granted. *Mendelson-Zeller Co. v. United Fruit Distributors*, 16 A.D. 790 (1957). Accordingly, respondent's default in the filing of an answer is set aside. Respondent M.E.G. Distributors, Inc., shall have ten days from its receipt of this order to file an original and five copies of its answer. If a timely answer is not filed, the default will be reinstated.

Copies of this order shall be served upon the parties.

SIX L'S PACKING COMPANY, INC. v. PLAINVILLE PRODUCE, INC.
PACA Docket No. 2-7455.
Order issued September 14, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultura Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A time complaint was filed in which complainant seeks reparation against responde in the amount of $1,670.40 in connection with a transaction involving tl shipment of cherry tomatoes in interstate commerce.

A copy of the formal complaint was served on respondent. By letter da July 14, 1987, respondent notified the Department that a settlement had b reached. Complainant was given an opportunity to dispute such settlem and did not do so.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

SKOOKUM, INC. v. MORENO PRODUCE COMPANY.
PACA Docket No. 2-6190.
Order issued September 24, 1989.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $1,983.00 in connection with a transaction involving the shipment of apples in interstate commerce.

On August 1, 1983, this matter was stayed pending completion of respondent's bankruptcy.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

SMITH, MAURICE J., JR., d/b/a SMITH FARMS v. IMPERIAL BRANDS, INC.
PACA Docket No. 2-7017.
Order issued September 4, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER VACATING PRIOR ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation of $76,633.12 against respondent in connection with transactions in interstate commerce involving shipments of peaches. A copy of the complaint was served upon respondent, and respondent has filed an answer thereto. On August 14, 1986, this proceeding was stayed because respondent had filed a voluntary bankruptcy petition in the United States Bankruptcy Court for the Middle District of Florida. The Department now has been advised that that petition was dismissed on April 30, 1987. Accordingly, the automatic stay provision of 11 U.S.C. § 362 no longer compels us to stay this proceeding, and the August 14, 1986, Order is vacated.

Copies hereof shall be served upon the parties.

STATE WIDE SALES CO., INC. v. BOZZELLI FARMS, INC.
PACA Docket No. 2-7638.
Order issued September 22, 1987.

Dennis Becker, Presiding Officer.
Thomas R. Oliveri, for Complainant.
Respondent, pro se.
Order issued by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant sought a reparation award against respondent in the amount of $20584.20 in connection with shipments of cauliflower and strawberries in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including indebtedness to complainant. However, respondent alleged in its answer that payments has been made to complainant, reducing the amount of indebtedness to $12,856.00. Complainant has acknowledged that the amount of indebtedness had been so reduced. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 C.F.R. 47.9(d)).

Complainant, State Wide Sales, Co., Inc., is a corporation whose address is 744 So. Alameda Street, Los Angeles, California. Respondent, Bozzelli Farms, Inc., is a corporation whose address is 3300 So. Galloway Street, Unit 112, Philadelphia, Pennsylvania. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order, with the exception of the amount of indebtedness, which has been reduced to $12,856.00. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C 499b) and have resulted in damages to complainant of $12,856.00. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $12,856.00, with interest thereon at the rate of 13 percent per annum from February 1, 1987, until paid.

Copies of this order shall be served upon the parties.

GORDON TANTUM, INC. v. MARC G. BENOIT.
PACA Docket No. 2-7599.
Order issued September 22, 1987.

Dennis Becker, Presiding Officer.
Complainant, pro se.
Respondent, pro se.
Order issued by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricult[illegible] Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A tim[illegible] complaint was filed in which complainant seeks reparation against respon[illegible] in the amount of $40,841.99 in connection with shipments of potatoes [illegible] interstate commerce. A copy of the formal complaint was served u[illegible] respondent, which filed an answer thereto, admitting the material allegati[illegible] of the complaint, including the indebtedness claimed by complain[illegible]

Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 C.F.R. 47.9(d)).

Complainant, Gordon Tantum, Inc. is a corporation whose address is P. O. Box 413, Cranbury, New Jersey. Respondent, Marc G. Benoit, is an individual whose address is 195 Pleasant Street, East Longmeadow, Massachusetts 01028. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $40,841.99. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $40,841.99, with interest thereon at the rate of 13 percent per annum from February 1, 1987, until paid.

Copies of this order shall be served upon the parties.

TOP QUALITY FRUIT & PRODUCE DIST., INC. v. VOLLMER PRODUCE, INC.
PACA Docket No. 2-7077.
Order issued September 1, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $4,793.95 in connection with a transaction involving the shipment of mixed produce in interstate commerce.

On October 1, 1986, this matter was stayed pending completion of respondent's bankruptcy.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

GLENWOOD TUCKER, d/b/a TUCKER PRODUCE COMPANY v. A.J. SALES COMPANY and/or DANA R. JOHNSON, d/b/a U.S. FOOD MARKETING.
PACA Docket No. 2-7480.
Decision and order issued September 2, 1987.

Burden of proof as to contract terms - Identity of buyer established - Open price is reasonable price at time of delivery - Market News Service Reports - Canada Department of Agriculture.

Complainant failed to prove specific price terms contemplated. Preponderance of the evidence establishes that prices were f.o.b. open. Preponderance of the evidence also establishes that

One respondent the broker and the other the buyer. The buyer is liable for the open price, determined by a reasonable price at the time of delivery. Such a price was found in the Market News Service for Bronx, New York and from the Canadian Department of Agriculture.

Andrew Y. Stanton, Presiding Officer.
Leo Daughtry, for Complainant.
Respondent, pro se.
Decision issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondents, in the alternative, in the amount of $11,526.00 in connection with the sale of four lots of sweet potatoes, in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each party. A copy of the formal complaint was served upon each respondent, who filed an answer thereto, denying liability.

Since the amount claimed as damages does not exceed $15,000,00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to such procedure, the report of investigation is considered part of the evidence, as are the verified complaint and answers. The parties were given the opportunity to submit additional evidence in the form of verified statements and to file briefs. Complainant and respondent Dana R. Johnson, d/b/a U.S. Food Marketing, elected not to submit any additional evidence. Respondent A.J. Sales Company submitted an answering statement. None of the parties filed a brief.

Findings of Fact

1. Complainant, Glenwood Tucker, d/b/a Tucker Produce Company, is an individual whose address is Route 4, Box 169B, Benson, North Carolina.

2. Respondent, A.J. Sales Company (hereinafter "A.J."), is a corporation whose address is P. O. Box 7798, Orlando, Florida. At the time of the transactions alleged in the complaint, A.J. was licensed under the Act.

3. Respondent, Dana R. Johnson, d/b/a U.S. Food Marketing (hereinafter "U.S.F.M."), is an individual whose address is 1021 Robert E. Lee Drive, Wilmington, North Carolina. At the time of the transactions alleged in the complaint, U.S.F.M. was licensed under the Act.

4. On approximately February 6, 1986, and February 8, 1986, complainant sold four truckloads of sweet potatoes to A.J., through U.S.F.M. acting as broker. The contracts provided that f.o.b. terms were in effect, but that th prices would be left open. It was understood that complainant would ship th sweet potatoes to A.J.'s customers. Complainant agreed to pay U.S.F.M. $.1 per bushel as brokerage. The details of these transactions were as follows On February 6, 1986, complainant sold to A.J. 450 bushels of U.S. numbe one sweet potatoes, with shipment to James Corrado, Inc., Clifton, New Jersey (shipment A); on February 6, 1986, complainant sold to A.J. 96 bushels of jumbo sweet potatoes and 300 bushels of U.S. number one sweet potatoes,

with shipment to Dublin Produce, Bronx, New York (shipment B); on February 8, 1986, complainant sold to A.J. 192 bushels of jumbo sweet potatoes, with shipment to Jacobson Products, Bronx, New York (shipment C); and on February 8, 1986, complainant sold to A.J. 922 bushels of U.S. number one sweet potatoes, with shipment to Canada Wide Produce, Montreal, Canada (shipment D). Several days later, U.S.F.M. issued memorandums of sale for each of the four shipments, reflecting the contract terms heretofore set forth, and sent copies of these memorandums to complainant and A.J. No objections were made to the memorandums.

5. The four truckloads of sweet potatoes were shipped in interstate or foreign commerce to A.J.'s customers, where they were accepted.

6. According to the Market News Service Reports from Bronx, New York, from February 7 through 14, 1986, the market price for North Carolina sweet potatoes was from $6.50 to $7.00 per container for U.S. number one, and $4.00 to $5.00 per container for large.

7. According to the Canadian Department of Agriculture, the market price for North Carolina U.S. number one sweet potatoes during the week of February 10 through 14, 1986, was $12.25 to $12.75 per container, in Canadian dollars. The exchange rate between the United States and Canada during that period was approximately $.72 in United States currency for every Canadian dollar.

8. From February 24 to 25, 1986, U.S.F.M. sent A.J. three invoices for freight covering the four shipments at issue, which U.S.F.M. apparently paid. The total amount billed was $3,706.00.

9. A.J. has not paid complainant for the four truckloads of sweet potatoes.

10. An informal complaint was filed on April 9, 1986, which was within nine months from when the cause of action alleged herein accrued. A formal complaint was filed on December 23, 1986.

Conclusions

Complainant claims that it sold the four truckloads of sweet potatoes to A.J., and shipped them to A.J.'s customers. According to complainant, U.S.F.M. acted as the broker. Complainant contends that A.J. is liable for the purchase price and, alternatively, if it is found to be without liability, U.S.F.M. should be found liable for failing properly to perform its broker's duties. Both respondents deny liability. U.S.F.M. insists it was only a broker, and correctly carried out its duties, including arranging for the sale of sweet potatoes from complainant to A.J., with shipment to A.J.'s customers, and preparing memorandums of sale for each of the four loads, which it claims to have sent to both parties. A.J. denies any contractual relationship with complainant, claiming that it obtained the sweet potatoes on consignment from U.S.F.M. Moreover, A.J. claims it was not even aware of complainant's alleged involvement until long after the transactions occurred.

Complainant, as the moving party herein, has the burden of proving the terms of the alleged contracts, any breach thereof, and the resulting damages, by a preponderance of the evidence. *Pablo Hernandez, d/b/a Pablo Distributors v. Paragon Distributing, Inc.*, 42 Agric. Dec. 438 (1983). Complainant's version of events is, for the most part, strongly supported by U.S.F.M. The only significant difference is that complainant claims there was an agreed price of $4.50 to $5.00 net per bushel for the U.S. number one

sweet potatoes, with the jumbo sweet potatoes to be handled on consignment. U.S.F.M. says that all of the product was sold on consignment, f.o.b., with open price terms in effect. U.S.F.M.'s memorandums of sale for each of the four truckloads indicate that the contract terms were f.o.b. open, with complainant the seller and A.J. the buyer, but do not mention specific prices or consignment terms. In view of this evidence, we do not believe complainant has sustained its burden of proving that specific prices were agreed to. However, we also do not believe that these transactions were intended to be consignments since, as stated, the memorandums of sale are devoid of any reference to consignments. Further, U.S.F.M.'s claim that the transactions were both consignments and f.o.b. sales with open price terms are inconsistent. In a consignment, title remains with the consignor until the goods are sold by the consignee. 77 C.J.S. Sales § 270 at 1072. In addition, the consignor is responsible for paying for freight. *Lindemann Farms, Inc. v. P. Tavilla Co., Inc.*, 39 Agric. Dec. 469 (1980). However, in an f.o.b. sale, title passes to the buyer at the point of shipment, *Gilbert Orchards, Inc. v. Ranali Enterprises t/a Mid-Valley Fruit Growers*, 30 Agric. Dec. 952 (1971), and it is the buyer who must pay for freight. *Wilbur Sonny Parker v. VBJ Packing*, 42 Agric. Dec. 1217 (1983). Therefore, based on the evidence submitted by complainant and U.S.F.M., we find that the contracts were for f.o.b. sales, with prices to be left open.

As previously noted, A.J. denies any contractual arrangement with complainant. In its answering statement, its president, Albert J. Thunell, has denied receiving U.S.F.M.'s memorandums of sale, although U.S.F.M. has stated in its sworn answer that the memorandum were sent to both parties, and complainant has admitted receiving copies. We cannot conceive of any reason why U.S.F.M. would send memorandums of sale to only one party to these transactions, and A.J. has not offered such a reason. We must, therefore, conclude that A.J. received the memorandums of sale indicating that it purchased the four truckloads of sweet potatoes from complainant on an f.o.b. basis, with open price terms in effect, and mae no objection to these memorandums. The preponderance of the evidence clearly shows that A.J. purchased the sweet potatoes f.o.b., with open price terms. Therefore, A.J. is liable for a reasonable price at the time of delivery, as determined by the market price of similar products at that time. *Wilbur Sonny Parker v. VBJ Packing, supra*, at 1221.

Shipment A left complainant in Benson, North Carolina, on February 6, 1986, and arrived at its destination in Clifton, New Jersey, on approximately February 7, 1986. Shipment B also left complainant on February 6, 1986, and arrived at Huntspoint, New York, on approximately February 7, 1986. Shipment C left complainant on February 8, 1986, and arrived at Huntspoint, New York, on approximately February 9, 1986, a Sunday. To determine the market price for these loads, we will take judicial notice of the price quotations found in the Market News Service Reports for Bronx, New York, on February 7, 1986, for shipments A and B, and on February 10, 1986, for shipment C. They both show the market price for North Carolina sweet potatoes as $6.50 to $7.00 per container for U.S. number one, and from $4.00 to $5.00 per container for large (Finding of Fact 6). Therefore, the market

price for the 450 containers of U.S. number one comprising shipment A was $6.50 per container, or $2,925.00; for the 300 containers of U.S.number one from shipment B it was $6.50 per container, or $1,950.00; for the 96 containers of jumbo from shipment B it was $4.00 per container, or $384.00; for the 512 containers of U.S. number one from shipment C it was $6.50 per container, or $3,328.00; and for the 192 containers of jumbo from shipment CC it was $4.00 per container, or $768.00. The total market price for shipments A, B and C was thus $9,355.00.

Shipment D left complainant on February 8, 1986, for delivery to Montreal, Canada, where it arrived on approximately February 10, 1986. To determine the market price for this load, we have taken judicial notice of the market price quoted by the Canadian Department of Agriculture for the week of February 10 through 14, 1986, for U.S. number one sweet potatoes from North Carolina. The price ranged from $12.75 per container, in Canadian dollars (Finding of Fact 7). Therefore, the 922 containers of U.S. number one sweet potatoes of shipment D had a market price of $11,294.50 in Canadian dollars. We have also taken judicial notice of the exchange rate between the United States and Canada during this period, which was approximately $.72 in United States currency for every Canadian dollar (Finding of Fact 7). This results in a market price of $8,132.04 for shipment D.

The total market price for the shipments was $9,355.00 and $8,132.04, or $17,487.04. From this figure must be deducted the amount A.J. was obliged to pay for freight of $3,706.00, leaving $13,781.04 as the amount owed by A.J. to complainant. However, complainant has only claimed damages of $11,526.00 in its complaint, and its reparation award will thus be limited to that amount.

The failure of A.J. to pay complainant $11,526.00 is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

As the complaint has been brought in the alternative, an action does not lie against U.S.F.M. In addition, the record discloses no violation of the Act committed by U.S.F.M. Therefore, the complaint against U.S.F.M. will be dismissed.

Order

Within 30 days from the date of this order, respondent A.J. Sales Company hall pay to complainant, as reparation, $11,526.00, with interest thereon at the rate of 13 percent per annum from April 1, 1986, until paid.

The complaint against Dana R. Johnson, d/b/a U.S. Food Marketing, is hereby dismissed.

Copies of this order shall be served upon the parties.

VEG-A-MIX v. PANDOL BROS., INC.
PACA Docket No. 2-7581.
Order issued September 14, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $324.25 in connection with a transaction involving the shipment of mixed vegetables in interstate commerce.

By letter dated August 20, 1987, complainant notified the Department that it no longer wished to pursue its claim.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

WOODY'S TOMATO CORP. v. PONTO BROS. & OBRIST, INC.
PACA Docket No. 2-7606.
Order issued September 3, 1987.

Dennis Becker, Presiding Officer.
Complainant, pro se.
David P. Martin, for Respondent.
Order issued by Donald A. Campbell, Judicial Officer

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $20,083.50 in connection with shipments of tomatoes in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 C.F.R. 47.9(d)).

Complainant, Woody's Tomato Corp., is a corporation whose address is P. O. Box 962, Palmetto, Florida 33561. Respondent, Ponto Bros., & Obrist, Inc., is a corporation whose address is P. O. Box 704, State Fair Boulevard, Syracuse, New York. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of $20,083.50. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $20.083.50, with interest thereon at the rate of 13 percent per annum from July 1, 1986, until paid.

Copies of this order shall be served upon the parties.

REPARATION DEFAULT ORDERS ISSUED BY DONALD A. CAMPBELL, JUDICIAL OFFICER
(SUMMARIZED)

ACTION PRODUCE v. SOSA PRODUCE CORP.
PACA Docket No. RD-87-464.
Default Order issued September 10, 1987.

Respondent was ordered to pay complainant, as reparation, $23,295.70, plus 13 percent interest per annum thereon from November 1, 1986, until paid.

ACTION PRODUCE v. WORLD FOODS INC.
PACA Docket No. RD-87-473.
Default Order issued September 15, 1987.

Respondent was ordered to pay complainant, as reparation, $7,544.30 plus 13 percent interest per annum thereon from November 1, 1986, until paid.

ACTION PRODUCE v. L. OKUN PRODUCE CO. INC.
PACA Docket No. RD-87-506.
Default Order issued September 30, 1987.

Respondent was ordered to pay complainant, as reparation, $2,879.05 plus 13 percent interest per annum thereon from January 1, 1987, until paid.

AMERICAN BANANA CO. INC. v. TUNICK PRODUCE CO. INC.
PACA Docket No. RD-87-467.
Default Order issued September 11, 1987.

Respondent was ordered to pay complainant, as reparation, $610.00 plus 13 percent interest per annum thereon from September 1, 1986, until paid.

ANTHONY FARMS INC. v. WINSTON C. BAILEY d/b/a CLAUDE BAILEY PRODUCE CO.
PACA Docket No. RD-87-470.
Default Order issued September 11, 1987.

Respondent was ordered to pay complainant, as reparation, $3,142.50 plus 13 percent interest per annum thereon from October 1, 1986, until paid.

ANTHONY FARMS INC. v. BREVARD PRODUCE DIST. INC.
PACA Docket No. RD-87-495.
Default Order issued September 29, 1987.

Respondent was ordered to pay complainant, as reparation, $8,157.50 plus 13 percent interest per annum thereon from March 1, 1987, until paid.

APACHE PRODUCE CO. INC. v. McALLEN PRODUCE CO. INC.
PACA Docket No. RD-87-501.
Default Order issued September 29, 1987.

Respondent was ordered to pay complainant, as reparation, $2,026.00 plus 13 percent interest per annum thereon from June 1, 1986, until paid.

ASSOCIATED POTATO GROWERS INC. v. GARY V. DIXON d/b/a BONNIE BLUE PRODUCE CO.
PACA Docket No. RD-87-476.
Default Order issued September 15, 1987.

Respondent was ordered to pay complainant, as reparation, $48,926.25 plus 13 percent interest per annum thereon from January 1, 1987, until paid.

ASSOCIATED PRODUCE DISTRIBUTORS v. ATLANTIC PRODUCE
PACA Docket No. RD-87-492.
Default Order issued September 28, 1987.

Respondent was ordered to pay complainant, as reparation, $1,638.00 plus 13 percent interest per annum thereon from December 1, 1986, until paid.

BELRIDGE PACKING CO. v. MICHAEL PREVOR & SYDNEY PREVOF d/b/a PREVOR MARKETING INTERNATIONAL.
PACA Docket No. RD-87-387.
Order issued September 28, 1987.

ORDER OF DISMISSAL

By letter dated July 22, 1987, complainant notified the Department tha its complaint had been completely settled.

Accordingly, the complaint was dismissed.

BIANCHI & SONS PACKING CO. v. 668 COMPANY INC.
PACA Docket No. RD-87-462.
Default Order issued September 10, 1987.

Respondent was ordered to pay complainant, as reparation, $28,344.00 plus 13 percent interest per annum thereon from August 1, 1986, until paid.

BONITA VALLEY APPLE CO. INC. v. HANSEN FOODS INC.
PACA Docket No. RD-87-372.
Default Order issued September 18, 1987.

ORDER DENYING PETITION FOR RECONSIDERATION AND STAY ORDER

Respondent moved that this matter be reconsidered, claiming that it sent a letter to the Department setting forth its defense.

Respondent's petition for reconsideration was denied because the default order was proper due to respondent's failure to file an answer to the complaint. However, respondent's petition clearly indicated that it had a defense which it wished to assert.

Therefore, respondent was given 10 days to file a motion to reopen, including a good reason why it failed to file a timely answer. The default order was stayed until the issuance of a further order.

BRONIA INC. a/t/a J & J PRODUCE v. GREEN VALLEY CO. INC.
PACA Docket No. RD-87-496.
Default Order issued September 29, 1987.

Respondent was ordered to pay complainant, as reparation, $2,977.15 plus [illegible] percent interest per annum thereon from September 1, 1986, until paid.

I. R. BUSHMAN & SON CORP. v. EARL G. CARAKER d/b/a E. CARAKER'S PRODUCE.
PACA Docket No. RD-87-504.
Default Order issued September 30, 1987.

Respondent was ordered to pay complainant, as reparation, $16,882.75 plus 13 percent interest per annum thereon from February 1, 1987, until paid.

CACTUS DISTRIBUTORS INC. v. CHAPMAN PRODUCE CO. INC.
PACA Docket No. RD-87-457.
Default Order issued September 9, 1987.

Respondent was ordered to pay complainant, as reparation, $2,681.25 plus 13 percent interest per annum thereon from December 1, 1986, until paid.

KENNETH C. COPPS d/b/a KEYSTONE COPPS BROKERAGE SERVICE v. MAC PRODUCE INC.
PACA Docket No. RD-87-502.
Default Order issued September 30, 1987.

Respondent was ordered to pay complainant, as reparation, $19,311.16 plus 13 percent interest per annum thereon from February 1, 1987, until paid.

CORNUCOPIA TRADING CO. INC. v. SOSA PRODUCE CORP.
PACA Docket No. RD-87-494.
Default Order issued September 29, 1987.

Respondent was ordered to pay complainant, as reparation, $12,543.95 plus 13 percent interest per annum thereon from April 1, 1987, until paid.

DEER CREEK PRODUCE INC. v. J. SEGARI AND CO. INC.
PACA Docket No. RD-87-509.
Default Order issued September 30, 1987.

Respondent was ordered to pay complainant, as reparation, $1,292.50 plus 13 percent interest per annum thereon from November 1, 1986, until paid.

DENNIS PRODUCE SALES INC. v. HAVANA POTATOES CORP.
PACA Docket No. RD-87-480.
Default Order issued September 16, 1987.

Respondent was ordered to pay complainant, as reparation, $1,300.00 pl 13 percent interest per annum thereon from June 1, 1986, until paid.

DON A-LYNN PRODUCE INC. v. SUNSPROUT HYDROPONICS OF MARYLAND INC.
PACA Docket No. RD-87-497.
Default Order issued September 29, 1987.

Respondent was ordered to pay complainant, as reparation, $4,256.25 plus 13 percent interest per annum thereon from October 1, 1986, until paid.

FIESTA FARMS COOPERATIVE v. B. H. COMPANY INC.
PACA Docket No. RD-87-499.
Default Order issued September 29, 1987.

Respondent was ordered to pay complainant, as reparation, $975.00 plus 13 percent interest per annum thereon from October 1, 1986, until paid.

GARNAND MARKETING INC. v. MAC PRODUCE INC.
PACA Docket No. RD-87-482.
Default Order issued September 16, 1987.

Respondent was ordered to pay complainant, as reparation, $5,042.50 plus 13 percent interest per annum thereon from September 1, 1986, until paid.

GARNAND MANUFACTURING INC. v. J. SEGARI AND CO. INC.
PACA Docket No. RD-87-507.
Default Order issued September 30, 1987.

Respondent was ordered to pay complainant, as reparation, $2,625.00 plus 13 percent interest per annum thereon from August 1, 1986, until paid.

GREEN LEAF FARMS v. JOSEPH PINTO SR. d/b/a EAST COAST PRODUCE.
PACA Docket No. RD-87-488.
Default Order issued September 17, 1987.

Respondent was ordered to pay complainant, as reparation, $4,752.00 plus 13 percent interest per annum thereon from September 1, 1986, until paid.

GRIFFIN-HOLDER CO. v. LEGRANT MORRIS d/b/a CLEVELAND FRUIT MARKET.
PACA Docket No. RD-87-483.
Default Order issued September 16, 1987.

Respondent was ordered to pay complainant, as reparation, $1,420.75 plus 13 percent interest per annum thereon from November 1, 1986, until paid.

HIGH AND MIGHTY FARMS INC. v. CENTRAL NEW YORK PRODUCE INC.
PACA Docket No. RD-87-455.
Default Order issued September 8, 1987.

Respondent was ordered to pay complainant, as reparation, $3,505.50 plus 13 percent interest per annum thereon from May 1, 1986, until paid.

HIGH AND MIGHTY FARMS, INC. v. CENTRAL NEW YORK PRODUCE, INC.
PACA Docket No. RD-87-455.
Order issued September 28, 1987.

ORDER VACATING DEFAULT ORDER AND DISMISSING COMPLAINT

Complainant notified the Department, by letter dated August 18, 1987, that respondent tendered to complainant a check in full settlement of complainant's claim. Complainant, in its letter, authorized dismissal of its complaint.

Accordingly, the default order was vacated and the complaint was dismissed.

LAURENCE D. KNUTSON & ROWE SANDERSON III d/b/a SANDERSON & KNUTSON FRUIT COMPANY v. ILIAS D. GIANNAKOPOULOS d/b/a LOUIS PRODUCE COMPANY.
PACA Docket No. RD-87-490.
Default Order issued September 17, 1987.

Respondent was ordered to pay complainant, as reparation, $10,673 plus 13 percent interest per annum thereon from November 1, 1986, u paid.

PETE LIGON INC. a/t/a P & M MARKETING v. STRATHMORE PRODUCE COMPANY INC.
PACA Docket No. RD-87-484.
Default Order issued September 16, 1987.

Respondent was ordered to pay complainant, as reparation, $14,608.75 plus 13 percent interest per annum thereon from November 1, 1986, until paid.

LINDEMANN FARMS INC. v. 668 COMPANY INC.
PACA Docket No. RD-87-461.
Default Order issued September 9, 1987.

Respondent was ordered to pay complainant, as reparation, $19,485.52 plus 13 percent interest per annum thereon from September 1, 1986, until paid.

L & P VEGETABLE CORP. v. GREEN GIANT FRUIT FAIR INC.
PACA Docket No. RD-87-474.
Default Order issued September 15, 1987.

Respondent was ordered to pay complainant, as reparation, $1,449.50 plus 13 percent interest per annum thereon from October 1, 1986, until paid.

H. C. MacCLAREN INC. v. PHILIP J. VIVIANO & SAM VIVIANO d/b/a SAM VIVIANO & SON.
PACA Docket No. RD-87-479.
Default Order issued September 16, 1987.

Respondent was ordered to pay complainant, as reparation, $7,888.60 plus 13 percent interest per annum thereon from September 1, 1987, until paid.

MAUNA KEA AGRONOMICS INC. v. SUNSPROUT HYDROPONICS OF MARYLAND INC.
PACA Docket No. RD-87-456.
Default Order issued September 8, 1987.

Respondent was ordered to pay complainant, as reparation, $18,250.00 plus 13 percent interest per annum thereon from October 1, 1986, until paid.

MEREX CORP. v. DAVIS DISTRIBUTORS INC.
PACA Docket No. RD-87-468.
Default Order issued September 11, 1987.

Respondent was ordered to pay complainant, as reparation, $10,369.65 plus 13 percent interest per annum thereon from November 1, 1986, until paid.

MID-ATLANTIC PRODUCE SALES INC. v. A & E PRODUCE CORP.
PACA Docket No. RD-87-453.
Default Order issued September 8, 1987.

Respondent was ordered to pay complainant, as reparation, $966.00 plus 13 percent interest per annum thereon from January 1, 1987, until paid.

OPPENHEIMER COMPANIES INC. a/t/a BONDED FOODS COMPANY v. CONSUMER QUALITY FOOD SERVICES INC.
PACA Docket No. RD-87-458.
Default Order issued September 9, 1987.

Respondent was ordered to pay complainant, as reparation, $2,959.05 plus 13 percent interest per annum thereon from May 1, 1986, until paid.

PACIFIC FARM COMPANY v. BREVARD PRODUCE DIST. INC.
PACA Docket No. RD-87-460.
Default Order issued September 9, 1987.

Respondent was ordered to pay complainant, as reparation, $378.75 plus 13 percent interest per annum thereon from September 1, 1986, until paid.

PACIFIC FARM COMPANY v. PAT WOMACK INC.
PACA Docket No. RD-87-465.
Default Order issued September 10, 1987.

Respondent was ordered to pay complainant, as reparation, $24,243.13 plus 13 percent interest per annum thereon from October 1, 1986, until paid.

PACIFIC FARM COMPANY v. SAM'S PRODUCE DISTRIBUTING CO.
PACA Docket No. RD-87-503.
Default Order issued September 30, 1987.

Respondent was ordered to pay complainant, as reparation, $3,062.40 plus 13 percent interest per annum thereon from November 1, 1986, until paid.

PACIFIC FRESH MARKETING INC. v. MUNCHY PRODUCE INC.
PACA Docket No. RD-87-472.
Default Order issued September 15, 1987.

Respondent was ordered to pay complainant, as reparation, $578.20 plus 13 percent interest per annum thereon from September 1, 1986, until paid.

PLOVER PRODUCE INC. v. PAT WOMACK INC.
PACA Docket No. RD-87-481.
Default Order issued September 16, 1987.

Respondent was ordered to pay complainant, as reparation, $8,025.00 plus 13 percent interest per annum thereon from November 1, 1986, until paid.

PRODUCE SPECIALISTS OF ARIZONA INC. v. EMPIRE PRODUCE.
PACA Docket No. RD-87-478.
Default Order issued September 15, 1987.

Respondent was ordered to pay complainant, as reparation, $3,733.40 plus 13 percent interest per annum thereon from April 1, 1986, until paid.

VAUGHN RUE PRODUCE CO. INC. v. JOSEPH PINTO, SR. d/b/a EAST COAST PRODUCE.
PACA Docket No. RD-87-489.
Default Order issued September 17, 1987.

Respondent was ordered to pay complainant, as reparation, $6,945.25 plus 13 percent interest per annum thereon from June 1, 1986, until paid.

RICHARD M. RUIZ d/b/a RUIZ PRODUCE CO. v. FLOYD CLAUSEN d/b/a FLOYD'S FRESH FRUIT & VEG.
PACA Docket No. RD-87-498.
Default Order issued September 29, 1987.

Respondent was ordered to pay complainant, as reparation, $3,613.98 plus 13 percent interest per annum thereon from November 1, 1986, until paid.

RICHARD M. RUIZ d/b/a RUIZ PRODUCE CO. v. J. SEGARI AND CO. INC.
PACA Docket No. RD-87-508.
Default Order issued September 30, 1987.

Respondent was ordered to pay complainant, as reparation, $1,015.85 plus 13 percent interest per annum thereon from December 1, 1986, until paid.

H. SCHNELL & COMPANY INC. v. THE PIONEER FRUIT & COMMISSION CO.
PACA Docket No. RD-87-485.
Default Order issued September 16, 1987.

Respondent was ordered to pay complainant, as reparation, $8,962.00 plus 13 percent interest per annum thereon from April 1, 1987, until paid.

BARBARA J. SMITH and DON R. SMITH d/b/a EAGLE BROKERS v. ILIAS D. GIANNAKOPOULOS d/b/a LOUIS PRODUCE COMPANY.
PACA Docket No. RD-87-469.
Default Order issued September 11, 1987.

Respondent was ordered to pay complainant, as reparation, $8,414.00 plus 13 percent interest per annum thereon from November 1, 1986, until paid.

SOUTH OMAHA FRUIT MARKET INC. v. TRI-CITY WHOLESALE INC.
PACA Docket No. RD-87-475.
Default Order issued September 15, 1987.

Respondent was ordered to pay complainant, as reparation, $6,770.55 plus 13 percent interest per annum thereon from December 1, 1986, until paid.

SOUTHWESTERN N. C. FARMERS COOPERATIVE INC. v. JOSEPH PINTO, SR. d/b/a EAST COAST PRODUCE.
PACA Docket No. RD-87-486.
Default Order issued September 17, 1987.

Respondent was ordered to pay complainant, as reparation, $10,668.50 plus 13 percent interest per annum thereon from September 1, 1986, until paid.

STEVCO INC. v. DEMPSEY-SPENCE INC. a/t/a SAN JACINTO PRODUCE COMPANY.
PACA Docket No. RD-87-471.
Default Order issued September 11, 1987.

Respondent was ordered to pay complainant, as reparation, $772.20 plus 13 percent interest per annum thereon from November 1, 1986, until paid.

TEX-SUN PRODUCE INC. v. EDWARDO FLOREZ.
PACA Docket No. RD-87-454.
Default Order issued September 8, 1987.

Respondent was ordered to pay complainant, as reparation, $9,089.82 plus 13 percent interest per annum thereon from April 1, 1986, until paid.

R. B. TODD COMPANY INC. v. JOSEPH PINTO, SR. d/b/a EAST COAST PRODUCE.
PACA Docket No. RD-87-487.
Default Order issued September 17, 1987.

Respondent was ordered to pay complainant, as reparation, $2,016.00 plus 13 percent interest per annum thereon from August 1, 1986, until paid.

R. B. TODD COMPANY INC. v. D. SCOLARO PRODUCE CO.
PACA Docket No. RD-87-491.
Default Order issued September 17, 1987.

Respondent was ordered to pay complainant, as reparation, $3,706.47 plus 13 percent interest per annum thereon from October 1, 1985, until paid.

U. I. GROUP INC. v. HELGET INDUSTRIES INC.
PACA Docket No. RD-87-477.
Default Order issued September 15, 1987.

Respondent was ordered to pay complainant, as reparation, $4,420.00 plus 13 percent interest per annum thereon from February 1, 1987, until paid.

HAROLD H. UTTER & RAYMOND L. UTTER d/b/a GRATZ & UTTER v. THE PIONEER FRUIT & COMMISSION CO.
PACA Docket No. RD-87-452.
Default Order issued September 8, 1987.

Respondent was ordered to pay complainant, as reparation, $29,778.00 plus 13 percent interest per annum thereon from November 1, 1986, until paid.

VAL-MEX FRUIT COMPANY INC. v. T & L DISTRIBUTORS INC.
PACA Docket No. RD-87-466.
Default Order issued September 10, 1987.

Respondent was ordered to pay complainant, as reparation, $2,726.25 plus 13 percent interest per annum thereon from June 1, 1986, until paid.

VEG-A-MIX v. SOSA PRODUCE CORP.
PACA Docket No. RD-87-463.
Default Order issued September 10, 1987.

Respondent was ordered to pay complainant, as reparation, $1,466.00 plus 13 percent interest per annum thereon from October 1, 1986, until paid.

VIRGINIA PRIDE FRUIT PACKERS INC. v. SUNSPROUT HYDROPONICS OF MARYLAND INC.
PACA Docket No. RD-87-505.
Default Order issued September 30, 1987.

Respondent was ordered to pay complainant, as reparation, $7,065.40 plus 13 percent interest per annum thereon from January 1, 1987, until paid.

TONY VITRANO COMPANY v. CONSUMER QUALITY FOOD SERVICES INC.
PACA Docket No. RD-87-459.
Default Order issued September 9, 1987.

Respondent was ordered to pay complainant, as reparation, $3,944.00 plus 13 percent interest per annum thereon from September 1, 1987, until paid.

WARE PRODUCE INC. v. McALLEN PRODUCE CO. INC.
PACA Docket No. RD-87-500.
Default Order issued September 29, 1987.

Respondent was ordered to pay complainant, as reparation, $7,045.00 plus 13 percent interest per annum thereon from August 1, 1986, until paid.

J. C. WATSON COMPANY v. BREVARD PRODUCE DIST. INC.
PACA Docket No. RD-87-493.
Default Order issued September 28, 1987.

Respondent was ordered to pay complainant, as reparation, $1,088.75 plus 13 percent interest per annum thereon from March 1, 1987, until paid.

In re: ISRAILOVA, BURLIANT.
P.Q. Docket No. 193.
Decision and order filed July 13, 1987.

Cynthia Koch, for Complainant.
Respondent, pro se.
Decision issued by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER

This is an administrative proceeding for the assessment of a civil penalty under the Plant Quarantine Act of August 20, 1912, as amended (Act), for a violation of the regulations issued under the Act that govern the importation into the United States of fruits and vegetables (7 C.F.R. § 319.56 *et seq.*.

This proceeding was instituted by a complaint filed on February 26, 1986, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that on or about August 20, 1985, the respondent had imported into the United States at John F. Kennedy International Airport, Jamaica, New York, from Israel, approximately two pounds of grapes in violation of section 319.56(c) of the regulations (7 C.F.R. § 319.56(c)), because the grapes were not imported under permit, as required by sections 319.56-2(e) of the regulations (7 C.F.R. § 319.56-2(e)).

In response to the complaint, respondent filed an answer dated March 12, 1986. In her answer, respondent admitted certain material allegations in the complaint. Specifically, respondent indicated her address, and admitted that she had grapes which were from Israel. Respondent explained that she took grapes with her in case she felt nauseous, and that she did not know all the laws of the United States since she was a recent emigrant from Russia. Respondent's explanations are not mitigating circumstances that should be considered in regard to whether the requested civil penalty should be assessed. *In re: Richard Duran Lopez*, __ Agric. Dec. __, __ (1985), nor do the matters set forth in undated letter filed June 29, 1987, excuse the violation.

In her answer, respondent failed to deny or otherwise respond to the other material allegations in the complaint. In accordance with section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)), such failure to deny or otherwise respond to an allegation in the complaint is deemed, for purposes of this proceeding, an admission of said allegation.

In view of the aforementioned facts, respondent has either admitted or is deemed to have admitted the material allegations in the complaint, and, therefore, respondent has waived her right to a hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). This Decision and Order, therefore, is issued pursuant to sections 1.136 and 1.139 of the Rules of Practice applicable to this proceeding (7 C.F.R. §§ 1.136 and 1.139).

Accordingly, the material facts alleged in the complaint, which respondent has admitted or is deemed to have admitted, are adopted and set forth herein as the findings of fact.

Findings of Fact

1. Respondent, Israilova Burliant, is an individual whose address is 4322 12th Avenue, Brooklyn, New York 11219.

2. On or about August 20, 1985, respondent imported into the United States at John F. Kennedy International Airport, Jamaica, New York, from Israel, approximately two pounds of grapes in violation of section 319.56(c) of the regulations (7 C.F.R. § 319.56(c)), because the grapes were not imported under permit, as required by section 319.56-2(e) of the regulations (7 C.F.R. § 319.56-2(e)).

Conclusions

By reason of the facts in the findings of fact set forth above, respondent has violated the Act and regulations promulgated thereunder. Therefoie, the following order is issued.

Order

Respondent, Israilova Burliant, is hereby assessed a civil penalty of two hundred and fifty dollars ($250.00) which shall be payable to the "Treasurer of the United States" by a certified check or money order, and shall be forwarded to:

U.S. Department of Agriculture
Animal and Plant Health Inspection Service
Field Servicing Office, Accounting Section
Butler Square West, 5th Floor
100 North Sixth Street
Minneapolis, Minnesota 55403

within thirty (30) days from the effective date of this order.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective 35 days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.145).

[This decision and order became final September 8, 1987.-Editor]

CONSENT DECISIONS ISSUED
SEPTEMBER 1987

(Not published herein.-Editor)

Animal Quarantine and Related Laws

COUCH, WAYNE. A.Q. Docket No. 203. September 9, 1987

ENIS, OTHO. A.Q. Docket No. 316. September 29, 1987.

JOHNSON, WILLIAM GARY, d/b/a G&N LIVESTOCK.
A.Q. Docket No. 216. September 23, 1987.

WHITE, DAVID, d/b/a WHITE LIVESTOCK AUCTION and
GALEN F. FREEMAN CALDWELL. A.Q. Docket No. 204.
September 17, 1987.

Animal Welfare Act

CLINICAL IMMUNO-DIAGNOSTICS. AWA Docket No. 429.
September 8, 1987.

HUMPHREY, RONALD. AWA Docket No. 359. September 28, 1987.

MAIKE, J.R. AND SANDRA, d/b/a MAIKE HUNTING CLUB, SANDY'S
KENNELS and MILL CREEK KENNEL; PRAIRIE WINDS KENNEL,
INC., and SYLVIA M. SIMMONS. AWA Docket No. 421.
September 4, 1987.

TROUT, SHARON d/b/a TROUTS PETS. AWA Docket No. 420.
September 22, 1987.

Horse Protection Act

GREEN, RONALD E., and MARY MEDINA. HPA Docket No. 191.
Consent Decision as to Ronald E. Green. September 9, 1987.
Consent Decision as to Mary Medina. September 9, 1987.

Packers and Stockyards Act

BERRY, LYNDELL. P. & S. Docket No. 6873. September 16, 1987.

DIXIE LIVESTOCK, INC., TOMMIE TURNER, JR., INC., TOMMIE
TURNER, JR., GREENVILE LIVESTOCK, INC., W. BRYAN HARGETT,
JR., PATES STOCKYARD, INC., CIRCLE S. LIVESTOCK, INC., N.
ADOLPH STEWART, AND BARBARA E. STEWART.
P&S Docket No. 6738. Decision as to Pates Stockyard, Inc.
September 29, 1987.

FARMERS LIVESTOCK MARKET, INC. P. & S. Docket No. 6754. September 16, 1987.

HEMENWAY, TIM. P. & S. Docket No. 6926. September 21, 1987.

MORGAN, MICHAEL R. P&S Docket No. 6925. September 21, 1987.

NEW DETROIT VEAL AND LAMB, INC., AND MELVIN J. GITLER. P. & S. Docket No. 6882. September 17, 1987.

STULL MEATS, INC., HAROLD STULL, ROBERT LINDAHL, DELTA MEAT PACKING CO., INC., CHARLES PILCH, KANSAS CITY MEAT CO., FRANK GOLDSTEIN, GLOBE PACKING CO. AND REUBEN KRASN. P&S Docket No. 6669. Decision with Respect to Robert Lindahl. September 22, 1987.

TRI COUNTY LIVESTOCK AUCTION, INC., AND RICHARD O. QUINN. P&S Docket No. 6828. September 8, 1987.

Plant Quarantine Act

AKIONA, MARY. P.Q. Docket No. 224. September 29, 1987.

DEAN, PAT. P.Q. Docket No. 223. September 28, 1987.

GOLD, SANDY. P.Q. Docket No. 221. September 28, 1987.

HSIANG-HSIN CHEN, d/b/a, HAPPY DRAGON CLINIC. P.Q. Docket No. 329. September 29, 1987.

JANSEN, R. P.Q. Docket No. 222. September 29, 1987.

SCHWARTZ, ANNE FRANCES. P.Q. Docket No. 194. September 28, 1987.

UNITED AIRLINES. P.Q. Docket No. 226. September 28, 1987.

UNITED AIRLINES. P.Q. Docket No. 274. September 29, 1987.

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